In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER,

v.

ATRAIN LINES, INC.; PACIFIC FAR EAST LINE, INC.; THE OCEANIC STEAMSHIP COMPANY; AND UNITED STATES OF AMERICA, RESPONDENTS.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[1] The opinion of the Court of Appeals for the D.C. Circuit, the Commission Order approving Agreement No. 9903 and denying the request for hearing, and the Commission Order denying the petition to reopen are printed at pages 51, and 55, respectively, of the Appendix to the Petition for a Writ of Certiorari.

[2] Exhibits A-D consist of an inventory of the property and equipment transferred with the vessels.

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October 6, 1970—Agreement No. 9903 filed with Federal Maritime Commission [FMC] for approval.

October 21, 1970—Protest, Request for Hearing and Petition to Intervene filed with FMC by Seatrain Lines, Inc.

October 23, 1970—Reply of Pacific Far East Line, Inc. to Seatrain's Protest filed with FMC.

October 27, 1970—FMC issued Order approving Agreement No. 9903, and denying request for hearing.

November 6, 1970—Petition for Reopening filed by Seatrain Lines, Inc. with FMC.

November 18, 1970—Reply of Pacific Far East Line, Inc. to Petition for Reopening filed with FMC.

November 20, 1970—Oceanic Steamship Co. filed letter adopting position of Pacific Far East Line, Inc. as its own.

December 8, 1970—FMC issued Denial of Petition to Reopen the Matter of Approval of Agreement No. 9903.

February 8, 1971—Seatrain Lines, Inc. petitioned the Court of Appeals for the District of Columbia Circuit for review of the FMC Order of December 8, 1970.

November 24, 1971—Motion for Leave to Lodge Material And to Refer Thereto on Oral Argument, United States.

December 1, 1971—Response in Opposition to Motion of United States, Federal Maritime Commission.

December 3, 1971—Reply to Response in Opposition to Motion of United States, United States.

December 8, 1971—Order of the Court of Appeals for the District of Columbia Circuit granting Motion of United States.

March 23, 1972—Opinion and Judgment of the Court of Appeals for the District of Columbia Circuit.

Agreement No. 9903, less Exhibits A-D, including Exhibits E, F, and G:

CONTRACT OF SALE

THIS AGREEMENT is made in San Francisco, California, this 1st day of October, 1970, between THE OCEANIC STEAMSHIP COMPANY, a California corporation (hereinafter called "Seller") and PACIFIC FAR EAST LINE, INC., a Delaware corporation (hereinafter called "Buyer").

PART I—VESSELS

1. (a) Seller hereby agrees to sell and Buyer agrees to buy, on the terms and conditions set forth herein, the following vessels:

(A) SS MONTEREY—official No. 264,687, of about 14,799 gross and 7,496 net registered tons, with home port of San Francisco, California,

(B) SS MARIPOSA—official No. 265,137 of about 14,812 gross and 7,444 net registered tons with home port of San Francisco, California, subject to a First Blanket Preferred Mortgage in favor of the United States of America, dated July 28, 1955 (herein "First Mortgage") and a Second Preferred Fleet Ship Mortgage in favor of Crocker-Citizens National Bank (formerly Crocker-Anglo National Bank), Trustee, dated December 28, 1956 (herein "Second Mortgage"), together with (always excluding slop chests and supplies, crews' personal effects and any leased equipment)

(i) all fresh water, unused rope and broached and unbroached deck, engine and steward's department stores and provisions remaining on board at delivery; and all the outfit, equipment, spare parts and gear of and other property appurtenant to said vessels, on board at delivery (including without limiting the generality of the foregoing, all lubricating oils, engine bar stocks, tools, furniture, rugs, curtains, lamps, mattresses, pillows, galley pots and pans, nautical instruments, and charts, plans, drawings, operating instructions, brochures, beauty shop supplies, medical supplies, photoshop supplies, print

shop supplies, silver flatware and hollow ware, glassware and steward's uniforms), and

(ii) the property and equipment ashore less any withdrawn for use on the vessel, listed on the attached Exhibit "A" pertaining to SS MARIPOSA and SS MONTEREY, and

(iii) passenger vessel store ashore listed on the attached Exhibit "B."

(b) Seller also agrees to sell and Buyer agrees to buy, on the terms and conditions set forth herein, the following vessels:

(A) SS SONOMA, official No. 252,413 of about 7,741 gross tons and 4,534 net registered tons, with home port of San Francisco, California,

(B) SS VENTURA, official No. 252,633 of about 7,870 gross tons and 4,587 net registered tons, with home port of San Francisco, California, together with (always excluding slop chests and supplies, crews' personal effects and any leased equipment)

(i) all the outfit, equipment, spare parts and gear of, and other property appurtenant to, said vessels on board and all fresh water and unused rope and broached and unbroached deck, engine and steward's department stores and provisions remaining on board at delivery, and

(ii) the property and equipment ashore less any withdrawn for use on the vessel, listed on the attached Exhibit "A" pertaining to SS SONOMA and SS VENTURA.

(c) Each of said vessels shall be delivered equipped and supplied for her intended service at a level not less than that customarily maintained by Seller, who will at all times prior to delivery provide reasonable security to prevent removal from the vessels of property subject to tranafer hereunder and will allow representatives of Buyer to participate in such security measures. Any orders to be given to ship's personnel pursuant to this Paragraph will be given by Seller, at Seller's discretion, rather than by representatives of Buyer. Buyer shall defend and indem-

nify Seller against claims or demands arising from acts of Buyer's representatives.

(d) Buyer shall pay the costs of transportation from Seller's premises and storage points of all shoreside items sold hereunder.

(e) Each vessel is classed +A1 E+AMS, by the American Bureau of Shipping. SS SONOMA and SS VENTURA will be delivered to Buyer in Class, with special survey No. 6 completed. SS MARIPOSA and SS MONTEREY will be delivered to Buyer in Class under continuous survey. Each vessel will be free of outstanding recommendations by the American Bureau of Shipping and the United States Coast Guard, with all certificates described in Exhibit "C" valid; free of average (subject to Paragraph 6 of Part I); charter free; with all gear and equipment in good operating condition; free of cargo except as provided in Paragraph 12(b) of Part V hereinafter, with all dry cargo compartments that are free of cargo clean swept; and with assurances satisfactory to Buyer that the vessel has been or will be cleared by Cargo Reinsurance Association as suitable for the carriage of cargo during 1971 without the assessment of additional premiums by cargo underwriters. Seller and Buyer agree to divide equally the costs for plates required to be replaced in order to clear the vessel with the Cargo Reinsurance Association for 1971, subject to the provisions of Part V, Paragraph 11(c).

2. The purchase price of each of the vessels, payment of which shall be in the manner provided in Part IV of this Contract, is as follows:

(A) SS SONOMA and SS VENTURA: $562,500 each,

(B) SS MARIPOSA and SS MONTEREY: $5,500,000 each.

3. (a) The sale of each vessel is subject to Buyer's acceptance thereof within 48 hours after Buyer superficially inspects the vessel afloat in San Francisco or such other scheduled United States Pacific Coast port as Buyer may timely elect, and inspects the vessel's American Bureau of Shipping and United States Coast Guard records. Such inspection shall be conducted not later than the next call of each vessel at such port subsequent to execution of this

Contract. It is understood that any rejection by the Buyer will be upon reasonable grounds.

(b) If the vessel is accepted, Seller agrees that thereafter during the period until it is delivered to Buyer, Seller will maintain the vessel and keep it repaired in accordance with Seller's customary maintenance and repair practices for such vessel.

4. The Buyer agrees for the benefit of the Maritime Administration and the Maritime Subsidy Board, United States Department of Commerce (herein referred to as "Maritime Administration") to be bound by all the provisions of Contract No. FMB-40 entitled "Construction-Differential Subsidy Contract" between THE OCEANIC STEAMSHIP COMPANY and the UNITED STATES OF AMERICA, represented by the FEDERAL MARITIME BOARD, dated the 28th day of July, 1955 (herein referred to as "Contract No. FMB-40") and Contract No. MA-1063, entitled "Contract of Sale of SS PINE TREE MARINER and SS FREE STATE MARINER" between THE OCEANIC STEAMSHIP COMPANY and the UNITED STATES OF AMERICA acting through the DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, including the provisions relating to the documentation, insurance, operation, and purchase and requisition by the UNITED STATES OF AMERICA of the SS MONTEREY (ex SS FREE STATE MARINER) and SS MARIPOSA (ex SS PINE TREE MARINER).

5. (a) This Contract shall not be effective unless the Maritime Administration, in writing, gives the consent required by Part II, Paragraph 27(b) of Contract No. FMB-44 entitled "Operating-Differential Subsidy Agreement" between THE OCEANIC STEAMSHIP COMPANY and the UNITED STATES OF AMERICA represented by the MARITIME ADMINISTRATION dated July 28, 1955, hereinafter referred to as "Contract No. FMB-44" and agrees to the amendment of said Contract to relieve Seller of the obligation to operate the foregoing vessels on Trade Route No. 27 and agrees to amend Contract No. FMB-81 entitled "Operating-Differential Subsidy Agreement" between PACIFIC FAR EAST LINE and the UNITED STATES OF AMERICA represented by the MARITIME ADMINISTRATION dated October 24, 1958,

to authorize Buyer to operate the foregoing vessels on said Trade Route No. 27.

(b) Nor shall this Contract be effective unless any approval of the Federal Maritime Commission required by Section 15 of the Shipping Act, 1916, to make it lawful shall have been obtained in writing.

(c) Nor shall this Contract be effective until:

(i) The Maritime Administration grants its written consent to the delegation to Buyer of Seller's obligations under First Mortgage and the 3⅛% Promissory Note secured thereby, to the substitution of Buyer for Seller as the Mortgagor in such First Mortgage and as the Promisor in such Promissory Note, and to the release of Seller from all obligations thereunder, and

(ii) Crocker-Citizens National Bank (formerly Crocker-Anglo National Bank), Trustee, and Maritime Administration grant written consent to the delegation to Buyer of Seller's obligations under Second Mortgage and the 3⅛% Insured Preferred Ship Mortgage Bond secured thereby, to the substitution of Buyer for Seller as the Mortgagor in such Second Mortgage and as the Obligor in such Insured Preferred Ship Mortgage Bond, and to the release of Seller from all obligations thereunder.

provided, however, that should the holder of the Second Mortgage referred to above require payment at an increased rate of interest or otherwise increase the cost of discharging the debt in question, Seller will reimburse to Buyer as incurred the amount of such increase, and, *provided*, further that should the holder of said Second Mortgage decline under any condition to give such written consent, or be willing to give such written consent under conditions which are not acceptable to Seller, or should Seller elect to prepay said Second Mortgage and the Bond it secures, then:

(1) Seller will satisfy said original Second Mortgage by discharging the debt secured thereby;

(2) Buyer will execute and deliver to Seller a new Bond and Second Mortgage for the amount of the balance of principal due at the time of such satisfaction,

which said new Bond and Second Mortgage shall incorporate the same terms and conditions (including interest rate) as would have governed had Buyer assumed the original Second Mortgage-Bond, excluding the provisions limiting recourse to the SS's MARIPOSA and MONTEREY; and

(3) the execution and delivery by Buyer of said new Bond and Second Mortgage in favor of Seller shall have the same effect for the purposes of this sub-paragraph (c) as though the holder of the original Second Mortgage and Note had given the consent hereinabove referred to.

(d) Nor shall this Contract be effective until the Maritime Subsidy Board and Bethlehem Steel Corporation give the consents necessary to assign the contracts listed in Part III, Paragraph 1(a).

6. (a) At the termination of the voyage of each vessel in progress at the closing date, referred to in Part IV, Paragraph 1(a), or such other voyage as may be mutually agreed upon, Seller shall drydock said vessel at San Francisco or such other United States Pacific Coast port as may be mutually agreed upon, for examination of the bottom and other underwater parts, if Buyer so requests. If the bottom or other underwater parts of the vessel are found damaged so as to affect the vessel's Certificate of Class, Seller shall make same good as necessary to maintain the vessel's Class without any outstanding recommendations.

(b) If Buyer so requests, the tailshaft shall be drawn for examination while the vessel is in drydock. The cost of drawing and replacing the tailshaft shall be borne by Buyer unless it is found that the tailshaft and related parts revealed thereby do not meet the requirements of the Classification Surveyor, in which latter event Seller shall bear such costs as well as the cost of performing such work as may be necessary to maintain the vessel's Class.

(c) If any underwater parts, including the tailshaft, shall require repairs or work to maintain the vessel's Class, or if examination of the SS SONOMA or SS VENTURA by Buyer is performed during the period that the vessel is in drydock for special survey No. 6, then the cost of putting the vessel into and taking her out of drydock,

drydock dues, Classification Society Survey fees, shipyards' costs for examination, and any othes expenses incident to the drydocking and examination shall be borne by the Seller; otherwise such costs shall be borne by the Buyer.

(d) Seller's responsibility for damage to the bottom or other underwater parts shall be limited to the repair of damage reported by the Classification Society's surveyor following the drydocking, except that to the extent the cost of repairing any damage not so reported is recoverable from Seller's underwriters, Seller shall use its best efforts to recover said amount and to the extent such recovery is not used by Seller to perform repairs of any damage not so reported, Seller shall promptly pay over to Buyer any amount so recovered.

7. On the completion of drydocking of each vessel and completion of all repairs or other work as required pursuant to Paragraph 6 above, Seller will give Buyer notice that the vessel is ready for delivery and within one day thereafter, unless Coast Guard or other government regulations prohibit such transfer of title, title to the vessel will be transferred at the Coast Guard District Office in port of delivery. At the time of such transfer and concurrent with the delivery of the vessel from Seller to Buyer, Seller will deliver to Buyer:

(a) A valid and sufficient Bill of Sale, transferring title to the vessel to Buyer free and clear of all liens and encumbrances except as otherwise herein provided and warranting title to said vessel.

(b) Evidence satisfactory to Buyer that the American Bureau of Shipping will issue to Buyer its Classification Certificate showing the vessel fully classed with no outstanding requirements or recommendations in respect to vessel's Class.

(c) Current Certificate of the United States Coast Guard of the vessel's home port, showing ownership of the vessel in Seller free and clear of all liens and encumbrances except as otherwise herein mentioned.

(d) Photostatic copy of current valid Inspection Certificate of the United States Coast Guard, without any citations, and a current valid Cargo Gear Certificate, annual and quadrennial.

(e) Copy of the permanent registry of the vessel or a receipt showing its delivery to the United States Coast Guard.

(f) All certificates, plans and drawings relating to the vessel in the possession of Seller.

(g) With respect to the SS MONTEREY and SS MARIPOSA:

(i) Executed counterpart of the document or documents to which written consent has been obtained pursuant to Paragraph 5(c)(i).

(ii) Executed counterpart of the document or documents to which written consent has been obtained pursuant to Paragraph 5(c)(ii) above unless a new Bond and Second Mortgage has been executed by Buyer in favor of Seller in accordance with the provisions of said Paragraph 5(c)(ii).

And Buyer will deliver to Seller:

(h) California Sales Tax Watercraft Exemption Certificate executed by Buyer.

(i) Check in payment for the bunker fuel oil purchased by Buyer pursuant to Paragraph 9 hereinafter.

8. Seller warrants that on delivery each vessel will be free from all liens, encumbrances, and debts of any kind whatsoever with the exception of the First Mortgage and Second Mortgage referred to hereinabove and the debts secured thereby, and Seller will indemnify Buyer against and hold Buyer wholly harmless from any loss, expense or liability, including without limitation attorneys' fees and legal expenses, reasonably incurred because of the assertion, whether successful or not, of any encumbrance, lien, debt or claim of whatsoever kind or nature existing or arising out of events occurring prior to delivery of the vessel. Without in any way limiting the generality of the foregoing, Seller agrees that in the event any vessel sold hereunder is seized or detained under legal process on account of any such encumbrance, lien, debt or claim, Seller will immediately arrange for the posting of a bond or take such other steps as are necessary to release the vessel without delay.

9. Buyer will purchase the bunker fuel oil aboard each

vessel at the time of delivery at Buyer's then current contract price at the port of delivery.

10. All models, pamphlets, printing blocks, plans, photographs of the vessels, publicity and promotional material, brochures, and other similar material relating to each vessel, whether in the possession of Seller or in the possession of advertising agents or others, shall be delivered to Buyer not later than the time of delivery of such vessel.

11. Seller and Buyer each for itself represents and warrants that it is a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916, as amended.

12. California Sales Tax, if any, shall be paid by Seller.

Part II

Transferred Employees, Shoreside Business of the Vessels and Shoreside Equipment

1. (a) Buyer will offer to employ as of the closing date of the Contract those employees of Seller and Matson Navigation Company named on a list to be furnished by Seller to Buyer prior to closing of the Contract who are working for Seller's freight and passenger services. Seller and Matson Navigation Company will transfer to Buyer on the date of closing of the Contract all employees named on such list who accept Buyer's offer of employment.

(b) Prior to closing of the Contract the transferred employees will perform work for voyages to be commenced after delivery to Buyer of the vessels named in Part I of this Contract which are for the account of Buyer. After closing of the Contract the transferred employees will perform work required to complete those voyages in progress on the date of closing of the Contract which are for Seller's account. Seller will absorb the cost of all such employees prior to the date of closing of the Contract. Buyer will absorb the cost of all transferred employees on and after the date of closing of the Contract.

(c) Seller will make appropriate arrangements for space in Seller's building and provide related office services at Buyer's expense for Seller's employees who are to be transferred to Buyer until such employees can be moved to Buyer's facilities.

2. (a)

(i) Seller shall reimburse Buyer for severance benefits, if any, actually paid to any employee who transfers to Buyer from Seller or Matson Navigation Company on the closing of this Contract if Buyer terminates the employment of any such employee on or before One Hundred Fifty (150) days for employees located in Australia or New Zealand or on or before One Hundred Twenty (120) days for all other employees from the date of closing of this Contract, because Buyer finds that his continued employment is not required by Buyer in connection with the vessels purchased from Seller; provided that Seller shall not be

liable for severance benefits paid in excess of the severance benefits that would have been paid to any such employee under the Matson Navigation Company severance policy in effect on the date of transfer of employment to Buyer, and further provided that after termination of employment by Buyer such employee does not continue to perform services in connection with the vessels purchased from Seller, while employed by an agent of Buyer.

(ii) For each shoreside administrative employee transferred from Seller or Matson Navigation Company to Buyer on the closing of this Contract who is thereafter actively employed by Buyer for more than One Hundred Fifty (150) days for employees located in Australia or New Zealand or more than One Hundred Twenty (120) days for all other employees, Buyer will recognize shoreside service accrued in Seller's and Matson Navigation Company's employ for the purpose of determining severance benefits; *provided*, however, that such transferred employee will not be entitled to severance benefits in excess of the severance benefits that would have been payable to such employee under Seller's and Matson Navigation Company's severance policy in effect on the date of his transfer to Buyer if such employee had remained in Seller's or Matson Navigation Company's employ until termination of employment by Buyer, unless such service with Buyer subsequent to transfer would require, under Buyer's then existing severance policy, a larger payment to be made in which event such larger amount will be paid.

(b) For all shoreside administrative employees transferred from Seller or Matson Navigation Company to Buyer on the closing of this Contract who are thereafter actively employed by Buyer for more than One Hundred Fifty (150) days for employees located in Australia or New Zealand or more than One Hundred Twenty (120) days for all other employees, Buyer will recognize shoreside service accrued in Seller's and Matson's employ toward Buyer's benefit plans for vacation accrual and travel privileges and discounts. Buyer will enroll such transferees in its plans for Group Life, Hospital/Medical, Dental and Disability Insurance. Buyer, and Seller for employees of

Seller and Matson, will arrange with their respective insurers to eliminate any time lag in transferring under the respective group plans, in order than such transferees may be covered with no waiting period. Employees of Seller and Matson who are not vested under the "Retirement Plan for Certain Employees of Matson Navigation Company and its Subsidiary Companies" at the time of transfer to Buyer and who remain in the employment of Buyer more than One Hundred Fifty (150) days shall become vested when they have met any of the vesting requirements of such plan by reason of continuous service with Seller and Buyer and, if so required by the Plan, have attained age 55, and when so vested will be entitled to benefits established in such Plan on the date of transfer to Buyer for the period of service with Seller. Employees of Matson Navigation Company who are not vested under the "Alexander & Baldwin, Inc. Multi-Employer Retirement Plan" at the time of transfer to Buyer and who remain in the employment of Buyer more than One Hundred Twenty (120) days shall become vested when they have Ten (10) years continuous service with Matson Navigation Company and Buyer or attain age 55 while employed by Buyer, and when so vested will be entitled to benefits established in such plans on the date of transfer to Buyer for the period of service with Matson Navigation Company. Buyer will recognize shoreside service with Seller and Matson Navigation Company as "Affiliated Service" under Buyer's retirement plan for employees transferred from Seller or Matson Navigation Company under this Contract, and such transferred employees will be entitled to benefits established under Buyer's retirement plan for the period of service with Buyer. Such transferred employees who are members of the Alexander & Baldwin, Inc. Employees Investment Fund are to be fully vested in their contingent and member accounts as of the time of transfer.

Long Service Leave will be administered as follows for Seller's employees in Australia:

(i) If the employee has less than Ten (10) years service and employment is terminated by Seller without transfer to Buyer, or Buyer terminates employment within One Hundred Fifty (150) days after transfer because continued employment is not required by Buyer for the business of the vessels named in

Part I, Seller will pay to the terminated employee an amount calculated under the Matson Navigation Company severance plan.

(ii) If the employee has Ten (10) or more years of service and employment is terminated by Seller without transfer to Buyer, or Buyer terminates employment within One Hundred Fifty (150) days after transfer because continued employment is not required by Buyer for the business of the vessels named in Part I, Seller will pay to the terminated employee an amount calculated under the Long Service Leave program in Australia.

(iii) If an employee is transferred from Seller to Buyer and Buyer retains the employee more than One Hundred Fifty (150) days after transfer, Seller will transfer money to Buyer in an amount equal to the current value of the vested and unvested credits of such employees under the Long Service Leave program in Australia.

3. With the consent (if necessary) of respective Lessors, Seller shall transfer and assign to Buyer all its rights and obligations under such of Seller's office leases in Sydney, Melbourne, or Auckland as Buyer may request within Thirty (30) days from closing, with such proration of all tenants' rents and charges under the leases as may be agreed upon by the parties.

4. (a) Effective on the transfer of title to each vessel, Seller shall assign and deliver to Buyer all moneys received on account of advance sales of tickets or advance freight bookings for voyages on each such vessel, and will also deliver to Buyer all accounts, records and writings memorializing the then status of inquiries, commitments, or bookings by passengers and shippers. Buyer will perform all contracts for which such moneys have been received or refund such moneys to those entitled thereto, and will indemnify and hold Seller harmless from and against all claims and expenses arising out of Buyer's failure to so perform.

(b) In consideration of expenses for Buyer's voyages which have been prepaid by Seller, the employees of Seller and Matson Navigation Company who are transferred to Buyer will continue to perform the type of services they

have performed as employees of Seller and Matson Navigation Company required for processing prior cargo claims, passenger ticket adjustments, protection and indemnity claims for passengers and crew, report to Seller for Seller's voyages and termination and closing of Seller's business in New Zealand and Australia which includes termination of leases, accounting, preparation of tax returns and closing out Seller's business interests in New Zealand and Australia.

5. Buyer agrees to purchase from Seller "as is, whereis" the shoreside property and equipment as located and identified on the attached Exhibit "D" (incorporated herein by this reference) for the sum of $20,000 (TWENTY THOUSAND DOLLARS). Sales tax, if any, shall be borne by Seller. Seller will deliver possession of the office equipment listed on Exhibit "D" to Buyer at the time of closing of the Contract. All other property and equipment listed on Exhibit "D" will be delivered by Seller to Buyer in an orderly manner so that the vessels named in Part I can be properly served, whether operated by Seller or Buyer.

6. Seller has furnished Buyer with copies of all General Agency Agreements, Freight Agency Agreements, Passenger Agency Agreements, Travel Subagency Agreements, leases of office equipment, trade-out agreements, stevedoring contracts, terminal contracts, contracts for watchmen and guarding services, and all other contracts incidental and pertaining to Seller's operation of the vessels to be purchased, or, if oral, a statement of the essential features thereof.

Seller will use its best efforts to arrange, by assignment, novation or otherwise, that, as of respective dates to be agreed upon, Buyer be substituted for Seller in the continued performance of such of said contracts as Buyer designates, and in such event the rights, liabilities, expenses and income incurred or accruing under such contracts shall be apportioned between the parties as the circumstances fairly require.

Part III

Contracts for New Container Vessels

1. (a) Subject to Paragraph 5(d), Part I, Seller transfers and assigns to Buyer, effective on the date provided in Part IV for the closing of this Contract, all rights of Seller existing at such date of closing in and under the following contracts:

"Contract for the Construction of One Containership, MA Design C7-S-88a" between the United States of America represented by the Secretary of Commerce acting through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-89.

"Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-90.

"Contract for the Construction of One Containership MA Design, C7-S-88a" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-91.

"Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-92.

and Buyer hereby assumes and agrees to perform all obligations of Seller thereunder remaining unperformed on the closing date provided in Paragraph 1, Part IV.

(b) In conjunction with the transfer of said contracts, Seller agrees to:

(i) grant to Buyer a license to use plans for the construction of ships of the C7-S-88a Design, including working plans and other design and engineering data, that have been furnished by Seller to Bethlehem Steel Corporation and the Maritime Subsidy Board pursuant to the provisions of the Contracts designated as Contract No. MA/MSB-89 and Contract No. MA/MSB-91;

(ii) transfer and deliver to Buyer all plans, specifications, blueprints, correspondence, memoranda, contracts and other writings, documents, files and data pertaining to the negotiations and execution of said contracts and the construction of the vessels thereunder.

2. Buyer shall pay to Seller, in the manner provided in Part IV of this Contract, an amount equal to the amount which has been paid by Seller to the builder under said contracts as of the closing date provided in Part IV, Paragraph 1 hereof.

3. Seller warrants that as of said closing date Seller shall not be in default in the performance of any of Seller's obligations under said contracts, and that on the date of the execution of this Contract there are no amendments thereto or modifications thereof except those heretofore delivered to or brought in writing to the attention of Buyer and such further amendment or modifications as shall hereafter be made with Buyer's approval.

4. Seller warrants that it has no information or knowledge of any basis for a claim for patent, trademark, or copyright infringement, or of any assertions stating or implying the existence of such a claim. Seller makes no warranty, express or implied, that the vessels are or will be delivered free of the claims of any person by way of patent, copyright, trademark infringement, or that the vessels are free from defects in design, materials or workmanship. Seller shall within a reasonable time, after the receipt of a written request from Buyer, but at the expense of Buyer, render all reasonable assistance in the defense of any claim or suit for infringement.

Part IV—Closing of Contract

1. (a) This Contract shall be closed in the Main Office of Crocker-Citizens National Bank (hereinafter "the Bank"), One Montgomery Street, San Francisco, California, within five (5) working days from the time all of the consents referred to in Part I, Paragraph 5 above have been obtained, provided, however, that if all of said consents have not been obtained by 5 P.M., PST, January 15, 1971, or such later date as both parties shall agree to, then either party may by written notice to the other declare this Contract null and void and of no effect.

(b) At the time of such closing, Seller shall deliver to Buyer:

(i) Certified copy of a resolution of the Board of Directors of Seller authorizing the execution of this Contract and its implementation by Seller;

(ii) The written consents required under Part I, Paragraph 5(a), (b), (c) and (d), other than the consent to amend Contract No. FMB-81;

(iii) The assignments by Seller to Buyer referred to in Part III, Paragraph 1 in the form shown in Exhibit "E" hereto;

(iv) License for Buyer to use the C7-S-88a ship construction design granted under the provisions of Part III, Paragraph 1, in the form shown in Exhibit "F" hereto;

(v) An affidavit that Seller is a citizen of the United States within the meaning of the Shipping Act, 1916, as amended;

(vi) Bill of Sale to property and equipment described in Part II, Paragraph 5.

(c) And concurrently therewith Buyer at said time and place shall deliver to Seller:

(i) A certified copy of a resolution of the Board of Directors of Buyer authorizing the execution of this Contract and its implementation by Buyer;

(ii) The written consent to amend Contract No. FMB-81 required under Part I, Paragraph 5(a);

(iii) An affidavit that Buyer is a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916, as amended;

(iv) Payment in immediately available funds in a manner satisfactory to the Bank of 29% of the aggregate of the amounts set forth in Part I, Paragraph 2; Part II, Paragraph 5; and Part III, Paragraph 2, rounded down to the nearest $100,000; less $300,000;

(v) A Promissory Note in the amount of the balance due under this Contract provision for the payment of which is not elsewhere made providing for payment of said balance in three approximately equal annual installments on the first three anniversaries of the closing date of this Contract, interest on the unpaid balance at the daily prime rate charged by the Bank of America plus 1%, and prepayment without penalty. The Promissory Note shall be in the form and will contain the terms and conditions shown in Exhibit "G" hereto;

(vi) In the event Seller shall prepay the Second Mortgage and the Bond pursuant to Part I, Paragraph 5(c), a new Bond and Second Mortgage, as provided in said Paragraph.

2. The following shall be events of default under the Promissory Note:

(a) Default by Buyer in the payment of interest or principal due pursuant to said Note when the same shall become due and payable;

(b) Default by Buyer in the payment of the obligations assumed by Buyer under the Contracts assigned to Buyer pursuant to Part III, Paragraph 1;

(c) Default by Buyer under the First Mortgage or the Second Mortgage referred to in Part I, Paragraph 5(c);

(d) Buyer shall be dissolved or adjudged a bankrupt or shall make a general assignment for the benefit of its creditors or shall lose its charter by forfeiture or otherwise, or a receiver or receivers of any kind whatsoever, whether

appointed or not in Admiralty, Bankruptcy, Common Law or equity proceedings, and whether temporary or permanent, shall be appointed for the Vessels or for the property of the Buyer; or a petition for the reorganization of, or other proceeding or action in reference to, the Buyer under any of the provisions of the Bankruptcy Act shall be filed by the Buyer, or such petition shall be filed by creditors and the same is approved by the Court; or if reorganization of the Buyer under said Act is approved by the Court, whether proposed by a creditor, a stockholder or any other person whomsoever.

3. If any event of default by Buyer under the Promissory Note delivered to Seller under Paragraph 1(v) of this Part shall not be cured by Buyer within thirty (30) days from written notice by Seller to Buyer, the obligations of Buyer under the Promissory Note shall thereupon become immediately due and payable.

Part V—General Conditions

1. The provisions of Part V of this Contract apply to the whole of the Contract.

2. Without limitation of the other remedies of either party, the obligations hereunder of the Seller and of the Buyer shall be subject to a decree for specific performance by any court having jurisdiction.

3. Buyer and Seller represent to each other that neither has to its knowledge so acted that any brokerage or finder's fee is due to anyone as a result of the purchase/sale which is the subject of this Contract.

4. This Contract shall be construed and interpreted in accordance with the laws of the State of California.

5. Buyer shall not assign or delegate its rights or obligations under this Contract without the written consent of Seller and any attempt to do so shall be void.

6. Following the dates for the transfer of title to the Vessels and other property herein agreed to be sold or transferred, Seller will, on request of Buyer, execute and deliver to Buyer such further instruments in writing and do such further acts as may be required to complete or evidence the transaction herein provided for and Buyer will, on request, execute and deliver like instruments to Seller and perform like acts.

7. Title to all of Seller's records, documents, and papers pertaining to the items sold hereunder shall remain in Seller but any thereof which Buyer may reasonably require for use in connection with the use of the items or pertaining to the business of the vessels sold or transferred hereunder after the dates for the closing of title to the items shall either be delivered to Buyer or made available to it in such manner as may best meet the respective needs of the parties. In any case, the party receiving or retaining such records shall make them available to the other during a period of five (5) years following the date of closing of title to the items to which they pertain, or such longer period as is required by the Maritime Administration or any other Government agency.

8. All notices required to be given under this Contract shall be given by personal delivery, telegraph or registered mail letter to the folling addresses:

BUYER: PACIFIC FAR EAST LINE, INC.
141 Battery Street
San Francisco, California 94111

SELLER: THE OCEANIC STEAMSHIP COMPANY
100 Mission Street
San Francisco, California 94105

or to such other address as shall be set forth in a written notice given by one party to the other party in the manner described in this Contract.

9. If conditions are imposed upon the consents to be obtained under this Contract that would materially alter the terms of this Contract, and the parties cannot agree to an amendment of this Contract that would reflect those conditions, either party has a right to terminate this Contract on prompt written notice to the other.

10. Except as provided in Paragraph 11 hereunder, this Contract is not intended to be divisible, and the performance by each party in every material respect of the obligations on its part to be performed in the sequence provided herein is a condition to the obligation of the other party to render the performance thereafter or concurrently to be performed on its part, without regard to the fact that this Contract is divided into separate Parts.

11. (a) In the event of the actual or constructive total loss of any vessel prior to delivery to Buyer, delivery of said vessel shall be excused and such loss shall be treated as a prepayment on the closing date against the Promissory Note referred to in Part IV, Paragraph 1(c)(v) of an amount equal to the purchase price of said vessel, provided, however, that in the event of the actual or constructive total loss of either the SS MARIPOSA or SS MONTEREY prior to the closing date referred to in Part IV, Paragraph I, Buyer may at its election, if exercised prior to said closing date, declare this entire Contract null and void.

(b) If, as to any vessel, delivery cannot be made to or accepted by Buyer within 110 days after the closing date of the Contract for any reason (other than total or constructive total loss) beyond the control of the party unable

to perform, Buyer may terminate this Contract with respect to such vessel by giving written notice within five days after the expiration of said 110 days whereupon the obligation of Seller to deliver such vessel shall be excused and such termination shall be treated as a prepayment against the Promissory Note referred to in Part IV, Paragraph 1(c)(v) of an amount equal to the purchase price of said vessel.

(c) If Seller determines that the cost of placing either the SS SONOMA or SS VENTURA in Class, with Special Survey No. 6 completed, free of outstanding recommendations by the American Bureau of Shipping and the United States Coast Guard, with all certificates described in Exhibit "C" valid, with all gear and equipment in good operating condition as required by Paragraph 1(e), Part I, and of performing deferred maintenance and repairs under Paragraph 3(b), Part I, and of performing Seller's obligations under Paragraph 6, Part I, would reduce the proceeds of the sale of the vessel to Buyer below the scrap value of the vessel, Seller may elect to sell the vessel to a third party for its scrap value, and if such vessel is sold by Seller for its scrap value and Seller so notifies Buyer in writing, Seller shall be relieved of Seller's obligation to sell and deliver the vessel to Buyer under this Contract.

12. (a) It is the intention of the parties that transfer of the vessels from Seller to Buyer shall occur with a minimum of interruption in their gainful employment and a minimum of unnecessary expense or loss to Seller and Buyer, and each party agrees that in performing this Contract, it will at all times use its best reasonable efforts to achieve this objective.

(b) If, consistent with the foregoing intention, a vessel on arrival at port of delivery has cargo or passengers aboard destined to a beyond port, Buyer will, if requested by Seller, and to the extent it can reasonably do so without contravening any statute or breaching its subsidy contract;

(i) As to cargo:

Carry the goods to such beyond port on payment of reasonable freight and charges pursuant to a non-negotiable receipt authorized by 46 USC 1306 issued to Seller which will contain same terms and conditions as are found in Buyer's regular form bill of lading but will provide that

the responsibility for such cargo loss and damage as cannot be allocated between the parties on the basis of existing evidence will be borne between them in the proportion that gross freight applicable to such cargo is earned by each, or shall make such other provision for disposing of cargo claims as the parties may agree upon. Cargo not so on carried by Buyer will be discharged by Seller prior to delivery of vessel to Buyer.

(ii) As to passengers:

Complete performance of Seller's ticket contracts on payment to it by Seller of an equitable portion of the fare, each party to indemnify and hold harmless the other against passenger claims recognized or adjudged to be the responsibility of the indemnifying party.

13. Each party agrees to cooperate with the other to obtain the consents required by Part I, Paragraph 5.

14. This Contract constitutes the entire agreement between the parties and may not be modified or terminated except in a writing executed by duly authorized representatives of Buyer and Seller.

15. This Contract shall inure to the benefit of and shall be binding upon the parties and upon their respective successors.

IN WITNESS WHEREOF the parties hereto have executed this Contract as of the day and year first above written.

THE OCEANIC STEAMSHIP COMPANY	PACIFIC FAR EAST LINE, INC.
By MALCOLM H. BLAISDELL *President*	By L. C. ROSS *President*
Attest: WILLIS R. DEMING *Secretary*	Attest: K. S. LYNCH *Secretary*

FEDERAL MARITIME COMMISSION
Agreement No. 9903
Filed 10/6/70
Approved _____

Matson Navigation Company guarantees the performance of Seller's obligations under the foregoing Contract of Sale.

MATSON NAVIGATION COMPANY

By MALCOLM H. BLAISDELL
President

Attest:

WILLIS R. DEMING
Secretary

EXHIBIT E

ASSIGNMENT

AGREEMENT made this ____ day of _____, 1970 between MATSON NAVIGATION COMPANY, hereinafter called the "Assignor," and PACIFIC FAR EAST LINE, INC., hereinafter called the "Assignee."

Pursuant to the Contract of Sale entered into between the parties dated this ____ day of _____, 1970, it is agreed:

1. For valuable consideration, receipt of which is hereby acknowledged, the Assignor hereby assigns to the Assignee all its interest in the contracts designated:

A. "Contract for the Construction of One Containership, MA Design C7-S-88a" between the United States of America represented by the Secretary of Commerce acting through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-89.

B. "Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-90.

C. "Contract for the Construction of One Containership MA Design, C7-S-88a" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-91.

D. "Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-92.

2. The Assignee hereby assumes and covenants to perform all the duties of the Assignor under the respective contracts and guarantees to hold the Assignor harmless from any claims or demand made thereunder.

IN WITNESS WHEREOF the parties have executed this Assignment, on this ____ day of _____, 1970.

THE OCEANIC STEAMSHIP COMPANY

By _____

Attest:

_____

PACIFIC FAR EAST LINE, INC.

By _____

Attest:

_____

EXHIBIT F

LICENSE

THE OCEANIC STEAMSHIP COMPANY, a California corporation, grants to PACIFIC FAR EAST LINE, INC., a Delaware corporation, the right, privilege and license to use (exclusively for the construction of vessels for the use of or sale by PACIFIC FAR EAST LINE, INC.) plans for the construction of ships C7-S-88a Design, including working plans and other design and engineering data, that have been furnished by THE OCEANIC STEAMSHIP COMPANY to Bethlehem Steel Corporation and the Maritime Subsidy Board pursuant to the provisions of a contract entitled "Contract for the Construction of One Container Ship, MA Design C7-S-88a" between the United States of America represented by the Secretary of Commerce acting through the Maritime Subsidy Board and THE OCEANIC STEAMSHIP COMPANY and Bethlehem Steel Corporation, dated the 20th day of February, 1970, designated by Contract No. MA/MSB-89, and a contract entitled, "Contract for the Construction of One Containership MA Design, C7-S-88a" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, designated No. MA/MSB-91.

This license is granted pursuant to the Contract of Sale between the parties dated this ____ day of _____, 1970.

IN WITNESS WHEREOF, THE OCEANIC STEAMSHIP COMPANY has caused this license to be signed and sealed by its duly authorized officers.

THE OCEANIC STEAMSHIP COMPANY
By _____

Dated _____

(SEAL)

EXHIBIT G

PROMISSORY NOTE

San Francisco, California _____, 197—

Pacific Far East Line, Inc., a Delaware corporation, maker, promises to pay to the order of The Oceanic Steamship Company, a California corporation, payee: $_____ and interest on the unpaid balance at the daily prime rate charged by the Bank of America plus 1% from _____ payable on this date annually in three equal installments. Delinquent interest shall be added to principal and become a part of it and bear interest at the same rate as principal.

Events of default under this Promissory Note shall be:

(a) Default by maker in the payment of interest or principal due pursuant to said Note when the same shall become due and payable;

(b) Default by maker in the payment of the obligations assumed by Buyer under the Contracts assigned to Buyer pursuant to Part III, Paragraph 1 of the Contract of Sale between Pacific Far East Line, Inc. and The Oceanic Steamship Company dated _____;

(c) Default by maker under the First Mortgage or the Second Mortgage referred to in Part I, Paragraph 5(c) of the Contract of Sale between Pacific Far East Line, Inc. and The Oceanic Steamship Company dated _____;

(d) Maker shall be dissolved or adjudged a bankrupt or shall make a general assignment for the benefit of its creditors or shall lose its charter by forfeiture or otherwise, or a receiver or receivers of any kind whatsoever, whether appointed or not in Admiralty, Bankruptcy, Common Law or equity proceedings, and whether temporary or permanent, shall be appointed for the vessels or for the property of the maker; or a petition for the reorganization of, or other proceeding or action

in reference to, the maker under any of the provisions of the Bankruptcy Act shall be filed by the maker, or such petition shall be filed by creditors and the same is approved by the Court; or if reorganization of the maker under said Act is approved by the Court, whether proposed by a creditor, a stockholder or any other person whomsoever.

If any event of default by maker under this Promissory Note delivered to payee shall not be cured by maker within Thirty (30) days from written notice by payee to maker, the obligations of maker under this Promissory Note shall thereupon become immediately due and payable. Failure to exercise this option at the occurrence of one or more of these events shall not prevent its exercise at the occurrence of any other events.

If any provision or any word, term, clause, or part of any provision of this Note shall be invalid for any reason, the same shall be ineffective, but the remainder of this Note and of the provision shall not be affected and shall remain in full force and effect.

The maker of this Note and every person who assumes the obligations of this Note (1) consents and agrees to be bound by and comply with all promises, covenants, agreements, and provisions of this Note, and promises absolutely and unconditionally to pay it when due, whether at maturity, by acceleration, or otherwise; (2) agrees to pay costs and attorneys' fees, as set forth below, and costs and reasonable attorney's fees incurred in the enforcement of the guaranty contained in this Note; (3) consents to all waivers contained in this Note; (4) waives presentment, demand, protest, notice of protest, notice of dishonor, notice of nonpayment, and notice of any kind with respect to this note or any guaranty of it or the performance of the obligations under this note or any guaranty of it; (5) waives the right, if any, to the benefit of, or to direct the application of, any security hypothecated to the holder until all indebtedness of the makers to the holders shall have been paid; (6) waives the right to require the holder to proceed against any other person or pursue any other remedy before proceeding against him, and except as otherwise required by law, waives the right to require the holder to proceed against any security before proceeding against him; and

(7) agrees that no renewal or extension of this Note, including a renewal or extension in which this Note is surrendered, no change of rate of interest, no release, surrender, or substitution of security for this Note, no modification of the terms of any security or other agreement relating to this Note, no release of or covenant not to sue or covenant not to levy execution against property of any person liable on this Note, including any maker, guarantor, or indorser, no delay in the enforcement of payment of this Note or any guaranty of it, and no delay or omission in exercising any right or power under this Note or any guaranty of it, shall affect his liability.

The maker of this Note and every person who assumes the obligations of this Note, agrees to pay the following costs, expenses, and attorney's fees paid or incurred by the holder of this Note, or adjudged by a Court: (1) reasonable costs of collection, costs and expenses, and attorney's fees paid or incurred in connection with the collection, enforcement, or sale of this Note or any part of it, or of any security for it, or of any covenant of this note or such security, whether or not suit is filed; (2) costs of suit and such sum as the Court may adjudge as attorney's fees in any action to enforce payment of this Note or any part of it; and (3) costs of suit and such sum as the Court may adjudge as attorney's fees in any other litigation or controversy connected with this Note, or security for it, including but not limited to actions for declaratory relief that any such holder is required to prosecute or defend and actions for relief based on rescission, or actions to cancel this Note that any such holder is required to defend.

This Note, and the rights and obligations of parties to it, shall be governed by, and construed and interpreted in all respects in accordance with, the laws of the State of California.

The maker of this Note and every person who in writing assumes the obligations of this Note, hereby waives all rights and benefits conferred by the statute of limitations in any action on this Note, or any security for this Note, to the extent permitted by Section 360.5 of the California Code of Civil Procedure.

IN WITNESS WHEREOF, Pacific Far East Line, Inc. has caused this Note to be signed and acknowledged by its President, and its corporate seal to be affixed. Executed and

delivered in San Francisco, State of California, on _____, 197__.

PACIFIC FAR EAST LINE, INC.

By _____
(*Signature of Officer*)

_____
(*Title of Officer*)

AND BY _____
(*Signature of Officer*)

_____
(*Title of Officer*)

FEDERAL MARITIME COMMISSION
Agreement No. 9903
Filed 10/6/70
Approved _____

Letter of Transmittal of Agreement No. 9903, to Francis C. Hurney, Secretary, Federal Maritime Commission [FMC], from Leo C. Ross, President, Pacific Far East Line, Inc., dated October 6, 1970; Supplement thereto:

PACIFIC FAR EAST LINE, INC.
918 SIXTEENTH STREET, N.W. WASHINGTON, D.C. 20006
(202) 783-7733

October 6, 1970

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1405 Eye Street, N.W.
Washington, D.C. 20573

Dear Mr. Hurney: Subject: Contract of Sale between the Oceanic Steamship Company and Pacific Far East Line, Inc.

There are transmitted herewith three copies of the Contract of Sale dated October 1, 1970, between The Oceanic Steamship Company (Oceanic) and Pacific Far East Line, Inc. (PFEL) for the sale of four ships and for the assignment to PFEL of Oceanic's rights in two contracts with Bethlehem Steel Corporation for the construction of two containerships and in the associated Construction-Differential Subsidy contracts with the United States.

PFEL and Oceanic have been advised by their respective counsel that the Contract of Sale does not require approval of the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act, 1916, or any other statute administered by your Commission. However, if the Commission is of a contrary view, please consider this an application for such approval.

For your information, the contract is being submitted to the Maritime Subsidy Board for the approvals and consents specified in Part I-5 of the Contract.

Respectfully yours,

/s/ Leo C. Ross
Leo C. Ross
President

Attachs.

PACIFIC FAR EAST LINE, INC.
918 SIXTEENTH STREET, N.W. WASHINGTON, D.C. 20006
(202) 783-7733

October 6, 1970

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1405 Eye Street, N.W.
Washington, D.C. 20573

Dear Mr. Hurney: Subject: Contract of Sale between the Oceanic Steamship Company and Pacific Far East Line, Inc.

This will supplement my letter to you of this date, captioned as above.

The Contract of Sale between the Oceanic Steamship Company and Pacific Far East Line, Inc., previously transmitted, constitutes the entire transaction between the two companies; there are no supplementary or separate agreements between them.

We request expedited handling by your Commission because:

(1) The fact of this transaction has been public knowledge for some time and is adversely affecting the morale of the personnel of Oceanic. Despite our assurances that we intend to retain existing staff, there is an understandable feeling of uncertainty among Oceanic's personnel, especially among those best able to obtain other employment. We have already lost one key man in the Passenger Department.

(2) The passenger "season" in the Australian trade begins in November. The SS MARIPOSA is presently scheduled to sail November 3.

Respectfully submitted,

/s/ Leo C. Ross
Leo C. Ross
President

Protest, Request for Hearing and Petition to Intervene, Seatrain Lines, Inc., dated October 21, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

In re: AGREEMENT 9903—BETWEEN PACIFIC FAR EAST LINE, INC. AND OCEANIC STEAMSHIP COMPANY (AND MATSON NAVIGATION COMPANY, GUARANTOR)	Docket No. 70-

PROTEST, REQUEST FOR HEARING, AND PETITION TO INTERVENE OF SEATRAIN LINES, INC.

Seatrain Lines, Inc. ("Seatrain") hereby protests the consummation of Agreement No. 9903 between Pacific Far East Line, Inc. ("PFEL"), Oceanic Steamship Company ("Oceanic"), and Matson Navigation Company ("Matson"), guarantor of performance for Oceanic, for the sale of vessels and related equipment filed with the Federal Maritime Commission ("Commission") and noticed in the *Federal Register* of October 14, 1970. Seatrain requests that a hearing be held pursuant to a Commission investigation into the anticompetitive and prejudicial consequences of this agreement. Seatrain further petitions that it be allowed to intervene in that proceeding for the purpose of demonstrating the prejudicial impact of the agreement on Seatrain's operations in the Pacific trades.

1. Seatrain is a common carrier in the Pacific Coast/Hawaii and Guam trades and is considering entry into the trades between the Pacific Coast and the Far East (T.R. 29) and South Pacific (T.R. 27) in the future.

2. Agreement No. 9903 provides for the sale of the entire Oceanic fleet to PFEL thereby eliminating Oceanic as a competitor in the Pacific trades. Included in Oceanic's fleet are two cargo ships acquired by that company under the Merchant Ship Sales Act of 1946, two combination passenger/cargo ships built with construction-differential subsidy ("CDS"), and two containerships now being built with CDS. Also included in the arrangement are various understandings between the parties concerning related equipment, effects on employees, terminal facilities, and

subsidy contracts awarded by the Maritime Administration/Maritime Subsidy Board ("Board"). Oceanic has requested approval of the Board to withdraw these ships from its subsidized service on T.R. 27; while on its part, PFEL has applied for similar operating-differential subsidy ("ODS") contracts on T.R. 27 and also proposes to interchange the acquired ships with its current fleet operating on T.R. 29 (*Federal Register*, September 16, 1970).

3. PFEL serves Guam from California with two converted C-4 containerships and two breakbulk ships which call at Hawaii for outbound cargo. PFEL has also applied to the Board for approval under section 805(a) of the Merchant Marine Act, 1936, for permission to serve Hawaii as part of its subsidized service on T.R. 29. The ships to be acquired by PFEL could be used in direct competition with Seatrain in the services between the Pacific Coast and Hawaii, between Hawaii and Guam, and between the Pacific Coast and Guam. Seatrain would be severely prejudiced by the operation of CDS-built ships in these domestic trades.

4. The sale of these vessels increases the size and the scope of operation of PFEL's fleet. The sale also negates the possibility of PFEL entering into T.R. 27 as a competitor of Oceanic or of Oceanic entering T.R. 29 as a competitor of PFEL. This consolidation of common carriers would be a violation of section 7 of the Clayton Act (15 U.S.C. § 18) if carried out without Commission approval under section 15 of the Shipping Act, 1916, as amended. Invasions of the antitrust laws must be justified by the parties to the anticompetitive agreement. *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968). The resulting concentration of competition on these routes would constitute a formidable barrier to the entry of any prospective competitor such as Seatrain. The burden of demonstrating a counterbalancing transportation need rests heavily on PFEL and Oceanic.

5. Seatrain believes that Agreement No. 9903 is unjustly discriminatory and unfair as between carriers, will operate to the detriment of the commerce of the United States, and will be contrary to the public interest. Therefore, Seatrain asserts that the Agreement cannot and should not be approved by the Commission under section 15 of the Shipping Act, 1916, as amended.

WHEREFORE, Seatrain urges the Commission to commence an investigation concerning the impact of this Agreement and into the possibility of other mutual understandings or agreements not included within the scope of Agreement No. 9903. Seatrain requests that a hearing be ordered and that it be permitted to intervene and to fully participate in the proceeding. This would enable Seatrain to demonstrate that Agreement No. 9903 should not be approved.

Respectfully submitted,

By Marvin J. Coles
MARVIN J. COLES

By Paul M. Tschirhart
PAUL M. TSCHIRHART

COLES & GORETNER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for:
SEATRAIN LINES, INC.

October 21, 1970

[Certificate of Service Omitted in Printing]

Reply of Pacific Far East Line, Inc. to Seatrain Lines, Inc., dated October 23, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

IN THE MATTER OF CONTRACT OF SALE BETWEEN THE OCEANIC STEAMSHIP COMPANY AND PACIFIC FAR EAST LINE, INC.
(AGREEMENT NO. 9903)

REPLY OF PACIFIC FAR EAST LINE, INC.

Pacific Far East Line, Inc. (PFEL) files its reply to the Protest, Request for Hearing, and Petition to Intervene filed by Seatrain Lines, Inc. (Seatrain). Seatrain has neither a legitimate interest in nor standing to protest against Agreement No. 9903 between PFEL and The Oceanic Steamship Company (Oceanic).

1. Agreement No. 9903 relates principally to ships heretofore operated and hereafter to be operated on Trade Route 27 (Pacific Coast/Australia-New Zealand). As to that trade, the fact that Seatrain may be "considering entry into the trade . . . in the future" means nothing.

2. Seatrain states (Paragraph 2) that Agreement No. 9903 would eliminate "Oceanic as a competitor in the Pacific trades." Oceanic has no U.S.-flag competition on Trade Route 27. Neither PFEL nor Seatrain now operates on any part of that trade.

3. Seatrain must be aware of the inaccuracy of the statements made in its Paragraph 3. PFEL serves Guam only with two containerships; it does not operate breakbulk ships in that trade. The containerships operate only between the Pacific Coast and Guam; they do not carry cargo from Hawaii to Guam. PFEL's application for approval under Section 805(a) of the Merchant Marine Act, 1936, was amended by letters dated September 4 and September 10, 1970, so as to request only the carriage of domestic passengers (including their baggage and accompanied automobiles) on combination passenger-cargo ships (1) between ports in California and ports in Hawaii; (2) between any

United States ports in connection with cruises; and (3) between ports in California on regularly scheduled voyages on Trade Route 27. This was plainly stated in the Notice published by the Administration/Board in the *Federal Register* (35 Fed. Reg. 15655), to which Notice Seatrain responded.

With respect to Guam, PFEL stated in its reply to Seatrain's protest filed in Docket No. S-256 on October 19, 1970, and served upon Seatrain as follows:

> "Nothing filed by Seatrain is addressed to issues under Section 605(c), with the possible exception of its statement that Guam may somehow be construed to be a part of Trade Route 27 because of the inclusion in the route description of 'ports of islands lying along the general route' of Trade Route 27. But in fact Guam is not on Trade Route 27; it has not been served by Oceanic Steamship Company heretofore and PFEL does not intend to serve Guam with ships operated on Trade Route 27. PFEL did not intend its application to permit service between the United States and Guam by ships operated with subsidy on Trade Route 27, and has no objection to a specific restriction to that effect if the Board believes it is necessary."

The facts stated in PFEL's reply are accurate. The conclusion stated by Seatrain that "The ships to be acquired by PFEL could be used in direct competition with Seatrain in the services between the Pacific Coast and Hawaii, between Hawaii and Guam, and between the Pacific Coast and Guam . . ." is inaccurate.

4. Paragraphs 4 and 5 of Seatrain's document are merely vague and conclusory assertions without any factual or legal support. The Commission's Notice (35 Fed. Reg. 16114) was ample warning notice that such tactics would not be permitted, for it stated:

> "Any person desiring a hearing on the proposed agreement shall provide a clear and concise statement of the matters upon which they desire to adduce evidence. An allegation of discrimination or unfairness shall be accompanied by a statement describing the discrimination or unfairness with particularity. If a violation of the Act or detriment to the commerce of the United States is alleged, the statement shall set forth with

particularity the acts and circumstances said to constitute such violation or detriment to commerce."

This has not been done by Seatrain.

PFEL, therefore, requests that Seatrain's protest be given no weight, that the petition for leave to intervene, and request for hearing be denied, and that Agreement No. 9903 be approved.

Respectfully submitted,

/s/ Odell Kominers
ODELL KOMINERS
Attorney for
Pacific Far East Line, Inc.

Of Counsel:

KOMINERS, FORT, SCHLEFER & BOYER
500 Tower Building
Washington, D.C. 20005

October 23, 1970

[Certificate of Service Omitted in Printing]

Petition of Seatrain Lines, Inc. for Reopening, dated November 6, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

In re:

APPROVAL OF AGREEMENT No. 9903 AND DENIAL OF REQUEST FOR HEARING AND INVESTIGATION } Docket No. 70-

PETITION OF SEATRAIN LINES, INC. FOR REOPENING

Pursuant to Rule 16 of the Federal Maritime Commission's ("Commission") Rules of Practice and Procedure Seatrain Lines, Inc. ("Seatrain") respectfully petitions the Commission to reopen this matter for reconsideration of its Order of October 28, 1970 approving Agreement No. 9903. That agreement would permit Pacific Far East Line, Inc. ("PFEL") to purchase the entire fleet and subsidized operations of Oceanic Steamship Company ("Oceanic"). The Commission's approval of the agreement despite the timely-filed protest of Seatrain was based on a finding "that Seatrain has no standing in this matter and that its protest is without substance" (Order, p. 3).

Seatrain requests that the Commission reconsider its findings for the following reasons:

I. The proponents of the Order have failed to meet their burden of proof.

II. Seatrain was denied its procedural right to reply to PFEL's motion.

III. Seatrain has standing to protect its domestic service from unfair competition resulting from this agreement.

IV. Seatrain, as a prospective competitor, has standing to protest the concentration of competition in the foreign trades.

V. Seatrain, as a potential purchaser of the two containerships now being built, has been foreclosed from the opportunity to own and operate those vessels without subsidy in the Pacific trades.

I. The proponents of the order have failed to meet their burden of proof.

Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 556(d)) ("APA") implemented by Rule 10(o) of the Commission's Rules of Practice and Procedure places the overall burden of proof on the proponents of any agreement submitted for Commission approval. The Commission has noted that the "essential ingredient" for the accommodation of the Shipping Act with national antitrust policy is information or data in the hands of the parties to anticompetitive agreements:

> "[F]or presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act. . . ." *Mediterranean Pools Investigation*, 9 FMC 264, 290 (1966).

Agreement No. 9903 provides for the merger of two subsidized common carriers in the foreign commerce of the United States. As such it is clearly subject to section 15. *Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc. and W. R. Grace & Co. and Sale and Transfer of Prudential Assets to Grace Line, Inc.*, 11 SRR 284 (1969); *Merger—AML, APL and PFEL*, 11 FMC 53, *supp'l. report*, 11 FMC 81 (1967), *aff'd. sub nom. Matson Navigation Co. v. FMC*, 405 F.2d 796 (9th Cir. 1968); *Agreement 8555—Isbrandtsen Steamship Co., Inc. and American Export Lines, Inc.*, 7 FMC 125 (1962).

The merger of common carriers is, on its face, a transaction that would violate section 7 of the Clayton Act (15 U.S.C. § 18) but for the immunity provided by Commission approval under section 15. This probable antitrust violation alone is sufficient to bring into play the requirement for the parties to demonstrate a serious transportation need for the merger:

> "By its very nature an illegal restraint of trade is in some ways 'contrary to the public interest' and the

Commission's antitrust standards, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable context to the broad statutory concept of the public interest.

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"Congress has, it is true, decided to confer antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose. The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor. It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are. We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard." *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968).

Nowhere in the Commission's Order is there any indication that the parties to the merger have demonstrated even superficially that their inroad into the antitrust law is justified by some asserted transportation need. The Commission has chosen to ignore this standard and has apparently shifted the burden of proof to the protesting carrier,

Seatrain, to demonstrate in its initial pleading why the agreement should not be approved.[1]

Section 5(b) of the Administrative Procedure Act (5 U.S.C. § 554(b)) requires that every interested person be given timely notice of matters of fact and law asserted. We suggest that the evolution of a new legal standard and unprecedented allocation of the burden of proof constituted a change in the Commission's legal theory of procedure under section 15 and was improper notice to Seatrain prior to the issuance of the Commission's final Order of approval. Such action was therefore contrary to the APA. *Rodale Press, Inc.* v. FTC, 407 F.2d 1252 (D.C. Cir. 1968).

Furthermore, the *Federal Register* notice of October 14, 1970 provided only 10 days for protestants to accumulate any necessary documents and/or data to meet the burden which the Commission would now place on them. The Court of Appeals has noted that only preliminary views can be expected from protestants within that period of time:

> "'" Twelve days is skimpy, to say the least, if intended to include time required to sift through papers, consult clients, coordinate with other interested parties, research points of law, and put together documentary evidence. The Commission contends that time was of the essence. We do not think it necessarily impermissible to notice the matter for responsive filing in twelve days, in order to obtain *preliminary views*. If no protest is filed, or if no substantial issues are raised it may then be proper for the Commission to proceed and approve the agreements. Here the initial papers exposed issues of substance, issues of such obvious gravity that the Commission should not in any event need prompting from private parties before it holds a hearing." *Marine Space Enclosures v. FMC*, 420 F.2d 277, 587, n. 27 (D.C. Cir. 1969). (Emphasis added.)

Seatrain's protest was timely and raised substantial issues, namely:

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[1] We note also that this administrative shifting of the burden of proof was attempted in the Commission's Order to Show Cause of October 30, 1970 issued against the protesting carriers, Sea-Land Service, Inc. and Seatrain, in Docket No. 70-42: Agreement No. 9905 Between Moore-McCormack Lines, Inc. and American Export Isbrandtsen Lines, Inc.

(a) the prejudicial impact of the agreement on the domestic trades to Hawaii and Guam by promoting overtonnaging caused by CDS-built ships; and

(b) the anticompetitive consequences of the agreement in the Pacific trades by the foreclosure of potential competition and the erection of barriers to entry (Seatrain Protest, pp. 2-3).

As the court said in *Marine Space Enclosures, supra,* at 586:

"Certainly consideration of antitrust issues is required in this case, where they were timely raised by petitioner's protest, albeit in general terms.

Seatrain raised serious issues concerning the public interest as embodied in the antitrust laws. The Commission can set aside those laws only by finding that approval under section 15 is compelled by a serious transportation need. As the court made clear in *Marine Space Enclosures, supra,* at 587, n. 26:

"Here, however, we have under consideration an administrative action that is mandated for hearing by § 15 of the Shipping Act. The burden is not on the person who wants an unusual hearing (as in the case of rule-making, or waiver) but on the agency desiring the unusual dispensation from hearing."

The parties to the agreement were not required by the Commission to justify this merger agreement. Serious issues raised by the protestant were not investigated by the Commission prior to approval. No hearing was held. Seatrain was denied relief from the potentially detrimental effects of this agreement because within the allotted ten-day response period it failed to meet an arbitrarily placed burden of proof. All of these actions by the Commission were unlawful in light of the clear precedent of *Marine Space Enclosures.*

II. Seatrain was denied its procedural right to reply to PFEL's motion.

On October 23, 1970, PFEL filed a reply to Seatrain's Protest, Request for Hearing, and Petition to Intervene.

PFEL's reply consisted, *inter alia*, of a challenge to Seatrain's standing to be heard in this matter. Insofar as it raised the standing issue, the document constituted a motion for dismissal in the nature of an affirmative defense. As such, Seatrain should have been permitted the usual 15-day period within which to reply to the motion. This was obviated by the Commission's Order of October 30, 1970.

If the Commission is to deny the right of reply to motions such as this, every protestant and/or intervenor in the future will be required to anticipate motions challenging his interest and to carefully set out in detail the factual and legal basis for his standing to file with the Commission for relief. This would improperly place the burden of anticipating the defenses of the respondent carriers on those who seek to protect themselves from the harmful consequences of precipitant Commission action.

We do not believe that this is consistent with the spirit and intent of the APA which grants persons the right to proper notice of all matters of fact and law asserted (section 5(a) of the APA). The Commission's own Rule 5(e) states that new matters set forth in an answer by respondent will be deemed to be contraverted. Thus in complaint cases standing would be raised as a motion to dismiss and a reply would be permitted. Nor would an immediate decision before reply to a newly raised issue of standing be appropriate under the Federal Rules of Civil Procedure which either permit replies to all affirmative defenses raised (Rule 7a) or specify that such defenses are to be taken as denied or avoided and defer judgment on the issue (Rule 8d).

The Federal Register notice of October 14, 1970 did not require an affirmative statement of standing:

> "Any person desiring a hearing on the proposed agreement shall provide a clear and concise statement of the matters upon which they desire to adduce evidence. An allegation of discrimination or unfairness shall be accompanied by a statement describing the discrimination or unfairness with particularity. If a violation of the Act or detriment to the Commerce of the United States is alleged, the statement shall set forth with particularity the acts and circumstances said to con-

stitute such violation or detriment to commerce." 35 *Fed. Reg.* 16114.

Without warning, to require Seatrain to anticipate PFEL's motion to dismiss for lack of standing was an unreasonable determination by the Commission and an abuse of administrative discretion.

Seatrain has legal standing to protest Agreement No. 9903 before the Commission (see below). We were never given the opportunity to be heard, however, because the Commission decided the matter after an *ex parte* filing by PFEL. This arbitrary action by the Commission in violation of Seatrain's procedural rights should now be reversed through the process of reconsideration of the Commission's Order.

III. Seatrain has standing to protect its domestic service from unfair competition resulting from this agreement.

Seatrain operates containerships in the domestic trades between the Pacific Coast and Hawaii; between Hawaii and Guam, and between the Pacific Coast and Guam. PFEL operates two containerships acquired under the Vessel Exchange Act (section 510(i) of the Merchant Marine Act, 1936, as amended) between the Pacific Coast and Guam. These ships, GUAM BEAR and HAWAII BEAR, are restricted to use in that service. In addition, earlier this year PFEL operated two breakbulk ships, INDIA BEAR and CANADA BEAR, in a mid-Pacific service which called at Hawaii to pick up cargo for Wake Island, Kwajalein, and Guam before returning to the West Coast. (See testimony of Mr. Edwin A. Wester, PFEL Vice President, in Docket 69-56: Charter Agreement between Sea-Land and U.S. Lines, at pp. 4691 and 4714-15 of the transcript.) We now understand that these vessels have been transferred to operation in the West Coast/Far East trade (T.R. 29).

It is precisely this flexibility of operation which broadens the potential impact of any agreement between common carriers and which demonstrates Seatrain's legally protected interest. What would prevent the use of the newly acquired containerships (including two that have yet to be put in service) in the domestic trades? Or even more likely, what would prevent PFEL from releasing vessels

from current operation in the foreign trades to service in the domestic trades? There is little difference between increased competition in an overtonnaged trade caused directly by acquisition of ships for that trade or indirectly by acquisition of ships for a foreign trade which releases vessels for operation in the domestic trade. The impact on Seatrain would be just as severe either way. Yet the Commission neglected to acknowledge the potential impact of this merger on Seatrain in the domestic trades. Still worse, the Commission denied Seatrain the opportunity to elicit and present factual evidence of the extent and the unfairness of PFEL's acquisition.

Perhaps a restrictive condition on the use of the ships to be acquired from Oceanic and on any vessels already in PFEL's fleet would deter the detrimental impact of this agreement on the domestic trades. The Commission's Order made no mention of such a restriction and Seatrain was not given a chance to propose one.

Without restrictions on PFEL's operations, the acquisition of Oceanic's fleet represents a potential competitive threat to every other carrier in the Pacific trades, domestic or foreign. As the court stated in *Matson v. FMC, supra,* at 798:

> "The Commission found that Matson would suffer no injury as a result of the merger but would face greater competition. *This is sufficient to give standing.* . . . Further, if the Commission has power under § 15 to approve the agreement, the result would be to immunize the merger from the provisions of the antitrust laws, and Matson could never attack it in the future should injury later result." (Emphasis added.)

The permanence of this merger of Oceanic into PFEL is certain. The possibility of injury to Seatrain in the domestic trades to Guam and Hawaii is clear. The Commission erred in failing to find that Seatrain had standing to protect its existing domestic service.

IV. Seatrain, as a prospective competitor, has standing to protest the concentration of competition in the foreign trades.

Likewise, Seatrain has standing to protest Agreement No. 9903 on the basis of its effect in concentrating competi-

tion in the Pacific foreign trades, which market Seatrain is seriously considering for entry. Preservation of prospective competition is a worthy goal of regulatory agencies under settled legal precedent. *Stanwell Laboratories* v. *FAA*, 424 F.2d 859 (D.C. Cir. 1970); *Marine Space Enclosures v. FMC*, 420 F.2d 577 (D.C. Cir. 1969); and *Sea-Land v. Connor*, 418 F.2d 1142 (D.C. Cir. 1969).

In *Marine Space Enclosures, supra*, a non-terminal operator who was merely considering the building of a passenger terminal in New York was held entitled to an administrative hearing in which to protest an agreement which would foreclose the opportunity. In contrast, Seatrain is an established common carrier already serving some Pacific trades with the requisite experience and demonstrated know-how to expand into other Pacific trades. Hence, Seatrain's consideration of entry into the Pacific foreign trades is even more of a potentiality and represents more of a competitive interest than Marine Space Enclosure's desire to build a competitive terminal. This interest likewise deserves recognition thereby ensuring standing to protest anticompetitive effects.

As found by the Court of Appeals in *Marine Space Enclosures, supra*, at pp. 598-99:

> "The standing of a potential enterprise to object to agency action may be subject to skeptical inquiry when the action is of a type that increases competition. Petitioner's standing as a competitor, however, is established not only by its interest as a potential competitor, but by the nexus between that interest and the substantive objection that an order approving the agreements would not be in the public interest because of the way it operates to foreclose competition. *Even a potential competitor has standing to present non-frivolous claims of undue restraint on future competition.* . . . We must respect fully the standing requirements that insist on the kind of opposition of interests establishing a case or controversy. But we must be on guard lest the kind of deprecation of a competitor's standing, which evolved at common law in turning aside objections protesting against competition, should be applied mechanically and mistakenly in the direction of turning aside objections that are intended to preserve and enlarge competition. *Standing of poten-*

tial competitors is implicit. A major consideration of antitrust policy is preservation of potential market.

"This conclusion is fortified by the policy established by legislative enactment and extended by judicial doctrine, of vindicating antitrust legislation through private actions. In *Perma Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968), the Supreme Court overturned a decision that barred a private treble damage action based on the plaintiff's 'dirty hands,' saying that 'the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.' 392 U.S. at 139. See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969). Likewise, in administrative proceedings 'private citizens play a role in the effectuation of antitrust policy.' *City of Pittsburgh v. FPC*, 99 U.S. App. D.C. 113, 237 F.2d 741, 754 (1956). The pennant of 'private attorney general,' which may be hoisted by anyone with an economic stake who desires to signal issues of public interest, may be run to the very pinnacle of the mast in order to alert all concerned to storm signals of anti-competitive restraints." (Emphasis added.)

As Seatrain pointed out in its Protest, any potential competition between PFEL and Oceanic in the Pacific trades is foreclosed by this agreement. Furthermore, the concentration of competition in the Pacific trades and the attendant economics of administration, rationalization of sailings, and joint subsidies poses a formidable barrier to the entry of any carrier, especially an unsubsidized operator such as Seatrain. As the decided cases make clear and as sound public policy dictates, Seatrain has standing to protect a future service from possible irreparable injury resulting from this merger.

V. Seatrain, as a potential purchaser of the two containerships now being built, has been foreclosed from the opportunity to own and operate those vessels without subsidy in the pacific trades.

If given the opportunity, Seatrain would purchase the two new containerships now building and would use these

ships to enter the Far East service in competition with PFEL. Seatrain would operate the ships without operating-differential subsidy. The public would benefit (a) from increased competition in the Pacific foreign trade to the Far East, and (b) from a reduction in operating-differential subsidies.

The Commission is faced with two alternatives: (1) continued approval of Agreement No. 9903 resulting in subsidized operation of the new containerships, less competition in the foreign trades, and more competition in the already overtonnaged domestic trades; or (2) unsubsidized operation of the new containerships by Seatrain, another competitor in the Pacific trades, and no additional competition in the domestic trades. We think the more desirable alternative is obvious.

Conclusion

Seatrain urges the Commission to reconsider its Order of Approval of Agreement No. 9903. The Order was not based on substantial evidence of transportation need and was issued in clear contravention of Seatrain's rights. Furthermore, Agreement No. 9903 is unjustly discriminatory and unfair as between carriers, will operate to the detriment of the commerce of the United States, and will be contrary to the public interest. Therefore, it should not continue to be approved by the Commission under section 15 of the Shipping Act, 1916.

Respectfully submitted,

By Marvin J. Coles
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By Paul M. Tschirhart
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November 6, 1970

[Certificate of Service Omitted in Printing]

Reply of Pacific Far East Line, Inc. to Petition for Reopening dated November 18, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

IN THE MATTER OF CONTRACT OF SALE BETWEEN THE OCEANIC STEAMSHIP COMPANY AND PACIFIC FAR EAST LINE, INC.

(AGREEMENT No. 9903)

REPLY OF PACIFIC FAR EAST LINE, INC.

Pacific Far East Line, Inc. (PFEL) files this reply to Seatrain Lines, Inc.'s Petition for Reopening. Seatrain raises no new factual matter for Commission consideration.

Reopening is sought on a variety of legal grounds which amount to the proposition that the Commission did not give Seatrain sufficient notice or time in which to assemble a factual case that would reveal Seatrain's competitive interest in the PFEL/Oceanic agreement.[1] Thus, Seatrain claims the Commission's 10-day Federal Register notice was too hasty, that Seatrain was surprised the Commission would require some factual showing of a competitive interest, that this requirement was an unprecedented re-allocation of the burden of proof, and that Seatrain's competitive interest is revealed by the same old facts the Commission's Order found wanting. We shall respond to each of these arguments in turn.

I. Notice of the PFEL/Oceanic Agreement.

On October 14, 1970, this Commission noticed the PFEL/Oceanic agreement in the Federal Register advising interested persons to respond with their comments within 10 days.[2] This was not Seatrain's first awareness of the PFEL/Oceanic agreement either in fact or in contemplation of law. The essentials of the agreement had been reported in the public press two months earlier in the

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[1] We preserve our position that the PFEL/Oceanic agreement is not subject to Section 15, Shipping Act, 1916.

[2] The allotted time period was actually 18 days since the 10th day fell on Saturday, October 24th. FMC Rule 7(a), 46 C.F.R. 502.101.

August 14, 1970 issue of the C.I.B. Thereafter, on September 10th Seatrain wrote Maritime Administrator Gibson of its opposition to the PFEL/Oceanic agreement. Seatrain's September 10th letter clearly reveals that it was familiar with the essential terms of the PFEL/Oceanic agreement. Indeed, Seatrain concluded its letter to the Maritime Administrator by stating:

> Seatrain is presently considering whether the agreement between Oceanic and PFEL is subject to section 15 of the Shipping Act, 1916, 46 U.S.C.A. 814. In the event we determine that it is, we will file a request for a hearing with the Federal Maritime Commission. In such event, we will furnish a copy to the Maritime Subsidy Board for its information.

PFEL's ODS application relating to its use of the Oceanic vessels was published by the Maritime Administration in the September 16th Federal Register. Seatrain responded to that Federal Register notice on September 28th, and made yet another submission to Marad on October 12th in a companion proceeding just 2 days before the FMC noticed the pendency of the PFEL/Oceanic agreement. The law is abundantly clear that a person who has actual notice of an agreement required to be published in the Federal Register cannot claim to be adversely affected by an agency's failure to make formal Federal Register publication. 5 U.S.C. 552; *United States* v. *Aarons*, 310 F.2d 341 (2d Cir. 1962); *Kessler* v. *F.C.C.*, 326 F.2d 673, 690 (D.C. Cir. 1963). Not only did this Commission timely publish the PFEL/Oceanic agreement, but Seatrain knew of that agreement at least as early as September 10th, and no doubt earlier. Seatrain had ample opportunity to present this Commission a well-documented, thoughtful statement of its competitive interest in this proceeding. In any event Seatrain certainly now has had ample time to demonstrate a competitive interest, but has added nothing to its original protest.

II. Notice of Requirement That a Factual Showing of Competitive Interest be Demonstrated.

Seatrain also claims surprise that the Commission would not order the PFEL/Oceanic agreement to hearing absent a showing of Seatrain's competitive interest. This, it is

argued, unfairly burdened Seatrain with anticipating the defenses to its petition.

The argument is meritless. The Commission's Federal Register notice was directed to "[i]nterested parties" and informed them that:

> Any person desiring a hearing on the proposed agreement shall provide a clear and concise statement of the matters upon which they desire to adduce evidence. An allegation of discrimination or unfairness shall be accompanied by a statement describing the discrimination or unfairness with particularity. If a violation of the Act or detriment to the commerce of the United States is alleged, the statement shall set forth with particularity the acts and circumstances said to constitute such violation or detriment to commerce.

The Commission's notice by its terms required a particularized statement of the agreement's alleged infirmity. The Commission's rules by their terms require a proposed intervenor, such as Seatrain, to show "a substantial interest in the proceeding". FMC Rule 5(1). Those same rules require a petitioner, such as Seatrain, to "state clearly and concisely the petitioner's grounds or interest in the subject matter". FMC Rule 5(i). There is no substance then to Seatrain's claim of surprise. The Commission's Federal Register publication put Seatrain on notice; the Commission's rules put Seatrain on notice; and the case law put Seatrain on notice that the hearing process would not be activated unless it could demonstrate its competitive interest in the PFEL/Oceanic agreement. *Marine Space Enclosures, Inc.* v. *F.M.C.*, 420 F.2d 577, 591-92 (D.C. Cir. 1969). Again Seatrain's present petition filed after full awareness of the need to show some interest, shows none.

III. Allocation of the Burden of Proof.

Seatrain argues that the PFEL/Oceanic agreement is on its face a violation of Section 7, Clayton Act and must thereby be justified by a serious transportation need. While we have no quarrel with Seatrain's statement of the rule of law—that antitrust violations must be justified by transportation needs to receive Section 15 approval—the facts of this case simply do not fit Seatrain's argument.

Section 7, Clayton Act provides in relevant part (15 U.S.C. 18):

> No corporation engaged in commerce shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce, *where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*

The face of the Clayton Act has a different aspect than Seatrain would lead one to believe. It does not preclude all acquisition,[3] but only those acquisitions which substantially lessen competition in a definable relevant market. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 70 U.S. 294 (1962); *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964).

The PFEL/Oceanic agreement cannot be twisted into that mold. PFEL operates a subsidized service on the California segment of Trade Route 29, and an unsubsidized service from the Pacific Coast to Guam and return. Oceanic, with only four vessels in its fleet[4] and two vessels scheduled for delivery in 1972, operates on Trade Route 27. The companies do not compete with one another. The PFEL/Oceanic agreement hardly can be shown to result in a substantial lessening of competition between non-competitors. No Clayton Act violation flows from the agreement, and neither PFEL nor Oceanic was obligated to demonstrate a serious transportation need requiring the agreement. Under these circumstances it is enough if approval of the agreement is consistent with the Commission's regulatory purposes. It is here, for although directed to by the Commission, Seatrain was unable to particularize any "discrimination", "unfairness", "violation of the Act" or "detriment to commerce" which would follow upon approval of the agreement.[5]

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[3] Seatrain mistakenly characterizes the PFEL/Oceanic agreement as a merger. It is not a merger but an acquisition of assets. PEEL has contracted to purchase Oceanic's vessels and certain related equipment.

[4] Two C3's to be retired upon delivery of the two containerships now under construction and two combination vessels.

[5] FMC Federal Register Notice, October 14, 1970.

IV. Seatrain has no Competitive Interest in the Agreement.

Seatrain once again presses on the Commission the same "facts" which the Commission held did not demonstrate a sufficient competitive interest in the agreement. Seatrain argues that its Guam service may somehow be adversely affected by the agreement although PFEL's ODS application to the Maritime Administration which Seatrain has read demonstrates that none of the Oceanic vessels will be placed in PFEL's Guam service.[6] Seatrain argues that its Pacific Coast/Hawaii cargo service may somehow be adversely affected by the agreement although again PFEL's ODS application demonstrates that no such service will be offered.[7] The supposed flexibility of PFEL's operations which Seatrain argues will somehow be detrimental simply is not true. Thus the INDIA BEAR and CHINA BEAR Seatrain instances[8] have been sold and PFEL's ODS agreement holds the company to serve particular routes. Seatrain serving Puerto Rico, Europe, Hawaii and Guam has far greater flexibility.

With respect to the foreign trades Seatrain's petition for reopening presents the Commission nothing new except an adverb. Its earlier filing stated that Seatrain "is considering entry" in the Pacific trades.[9] Its petition for reopening states that Seatrain "is seriously considering" entry in the Pacific trades.[10] This allegation remains "all gauze and no substance",[11] rhetoric and not fact. Seatrain's petition

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[6] See Maritime Administration Federal Register Notice, September 16, 1970.

[7] *Ibid.*

[8] Petition of Seatrain Lines, Inc., for Reopening, p. 10.

[9] Protest, Request for Hearing, and Petition to Intervene of Seatrain Lines, Inc., pp. 1-2.

[10] Petition of Seatrain Lines, Inc., for Reopening, p. 12.

[11] Marine Space Enclosures, Inc. v. FMC, *supra*, at 592. None of the cases Seatrain cites in its petition for reopening, p. 12, is authority for ordering a hearing upon such flimsy allegations of potential competition as Seatrain advances. In Seanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir. 1970), the actual second low bidder on a government contract was held to have a sufficient competitive interest in the letting of that contract to the non-responsive low bidder. In Sea-Land v. Connor, 413 F.2d 1142, 1145 (D.C. Cir. 1969), Sea-Land had actually instituted "certain pre-inaugural plans for a containership service over the same route" served by AHL. Additionally, by the time of court review Sea-Land's competitive service was in operation. In Marine Space Enclosures, Inc. v. FMC, *supra*, at 590, that

is devoid of any particulars regarding dates, vessels, scheduling, etc. It is nothing more than a bald statement of subjective intention. As the Commission properly observed, Seatrain has been unable to demonstrate "the likelihood of any impact at all upon its operations which might result from approval of the agreement".[12] Seatrain's final argument of its supposed interest is simply that it would like to purchase the two Oceanic containerships now under construction which are among the vessels included in the PFEL/Oceanic agreement. Under Seatrain's theory the Commission must be forced into granting a hearing if a company with no other interest in an agreement claims that there is some portion of the agreement which it would prefer to have for itself. This is patently frivolous, would hamstring the Commission's functions, and lead to long and costly hearings for no other reason than that one company wishes to try to upset an agreement two other companies have reached.

Conclusion

For the foregoing reasons the Commission should deny Seatrain's petition for reopening and adhere to its original order approving Agreement No. 9903.

Respectfully submitted,

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company had already drawn up plans for a terminal complex which had won the enthusiastic support of New York planning officials. Beyond that the 70 year restraint on all other terminal operators was a patent and massive invasion of the antitrust laws and dissatisfaction with the agreement had been voiced by six different steamship companies whose business the terminal was supposed to service.

[12] FMC Order—Approval of Agreement No. 9903 and Denial of Request for Hearing and Investigation.

CERTIFICATION OF SERVICE

I hereby certify that I have this date mailed by first class mail, postage prepaid, a copy of the foregoing reply to:

Marvin J. Coles, Esquire
Coles & Goertner
1000 Connecticut Avenue, N. W.
Washington, D. C. 20036

/s/ Stephen F. Eilperin
STEPHEN F. EILPERIN

November 18, 1970

Letter to Francis C. Hurney, Secretary, FMC, from J. R. Kuykendall, Director, Government Relations, Oceanic Steamship Company, adopting Pacific Far East Line, Inc. Reply to Petition to Reopen, dated November 20, 1970:

MATSON LINES
THE OCEANIC STEAMSHIP COMPANY
1001 CONNECTICUT AVE., N. W.,
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November 20, 1970

Mr. Francis C. Hurney, Secretary
Federal Maritime Commission
1405 Eye Street, N. W.
Washington, D. C. 20573

Dear Secretary Hurney:

In connection with the petition of Seatrain Lines, Inc. for reopening of the Commission's order approving Agreement No. 9903, the Oceanic Steamship Company and Matson Navigation Company, parent company of Oceanic and guarantor of Oceanic's obligations under the subject agreement, hereby adopts as its own Pacific Far East Line, Inc.'s November 18 reply to said petition.

In respect to Seatrain's self-characterization as a potential purchaser of Oceanic's container ships, this is to advise that Oceanic has no plans to sell its container ships under construction to Seatrain in the event of disapproval of Agreement No. 9903.

Yours very truly,

/s/ J. R. Kuykendall
J. R. KUYKENDALL
Director, Government Relations

cc: Marvin J. Coles, Jr.

Motion for Leave to Lodge Material and to Refer Thereto on Oral Argument, United States, dated November 24, 1971:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEATRAIN LINES, INC.,
PETITIONER,
v.
FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
RESPONDENTS
and
PACIFIC FAR EAST LINE, INC. and THE OCEANIC STEAMSHIP COMPANY,
INTERVENORS.

No. 71-1093

MOTION FOR LEAVE TO LODGE MATERIAL AND TO REFER THERETO ON ORAL ARGUMENT

Respondent, United States of America, respectfully moves for leave to lodge the attached material and to make reference thereto during oral argument scheduled for December 10, 1971.

The attached material is taken from two nationally recognized financial publications—Moody's Transportation Manual, 1970, and The Fortune Directory (May 1970) of the 500 Largest U.S. Industrial Corporations etc. The material shows that intervenor, Pacific Far East Line, the acquiring firm in this litigation, is controlled by Consolidated Freightways, Inc., which had operating revenues for 1969 in excess of $450 million and ranked 19th in operating revenues among the nation's largest transportation companies.

This material is sought to be lodged to illustrate the kind of material which the respondent Federal Maritime Com-

mission could have taken into account, had the Commission held a hearing rather than summarily approved Agreement No. 9903.

Respectfully submitted,

IRWIN A. SEIBEL,
HARRY FIRST,
Attorneys for Respondent
United States of America

Washington, D. C.
November 24, 1971

[Certificate of Service Omitted in Printing]

Response in Opposition to Motion of United States, Federal Maritime Commission, dated December 1, 1971:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEATRAIN LINES, INC.,
PETITIONER,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
RESPONDENTS

and

PACIFIC FAR EAST LINE, INC. and THE OCEANIC STEAMSHIP COMPANY,
INTERVENORS.

No. 71-1093

RESPONSE IN OPPOSITION TO MOTION OF UNITED STATES OF AMERICA FOR LEAVE TO LODGE MATERIAL AND TO REFER THERETO ON ORAL ARGUMENT

The Federal Maritime Commission respectfully moves this Court, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure and Rule 6(b) of the General Rules of this Court, to disallow the motion of the United States of America for leave to lodge certain material with the Court and to refer thereto on oral argument. The basis of the Commission's opposition is that such material is over a year old and was available at the time that the briefs were filed herein, raises questions of the implications to be drawn from certain facts, which are in the first instance to be resolved by the regulatory agency rather than the courts and were so resolved in this proceeding, and in general may tend to distort the issues in this proceeding.

I. No Reason Appears for Admitting the Material at this Time.

The material which the United States desires to lodge with the Court consists of entries in certain financial publications: *Moody's Transportation Manual, 1970,* and *The*

Fortune Directory (May 1970). Such material was, of course, available well in advance of the filing of the brief of the United States here on July 19, 1971. In fact, as will appear from the motion of the United States for extension of time in which to file its brief, Respondent, Federal Maritime Commission, did not oppose an extension for such purpose of 16 days, to and including July 17, 1971, in effect July 19, 1971, July 17 falling on a Saturday.

II. The Significance of the Matter which the United States Desires to Lodge with this Court is a Question for Resolution by the Commission.

The material which the United States desires to lodge with this Court raises questions with respect to the significance of the relationship between Pacific Far East Line, Intervenor herein, and Consolidated Freightways, Inc. Such questions are, of course, to be resolved in the first instance by the Federal agency recognized by the Congress as possessing the requisite expertness in such matters. See e.g., *Marine Terminal* v. *Rederi Transatlantic*, 400 U.S. 62, 68-69 (1970); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952).

III. The Material which the United States Seeks to Lodge with the Court was Available to and Known by the Commission when the Decision Here Under Review was Rendered.

As outlined in II above, the significance of the proffered material is something which should in the first instance be considered by the Commission. To the extent, however, that such is of significance, it was known by and considered by the Commission in the subject proceeding here under review. The publications are matters of general information continuously available in the library of the Commission and regularly consulted by the Commission and its staff. The acquisition of Pacific Far East Line by Consolidated Freightways, Inc. was furthermore generally known throughout the maritime trade, and was specifically approved by the Maritime Administration in connection with the subsidized operations of Pacific Far East Line. Finally, and most importantly, as will appear from the appended correspondence and memorandum contained in the Com-

mission's files, the Commission specifically examined the relationship between Pacific Far East Line and Consolidated Freightways.* To allow specific receipt of the requested material will only isolate one fact known to and considered by the Commission in the proceeding below, a fact which the Commission is well acquainted with, and to which no reason appears to call the Court's special attention at this time.

For the foregoing reasons, it is respectfully requested that the motion of the United States for leave to lodge material and to refer thereto on oral argument be denied.

Respectfully submitted,

JAMES L. PIMPER
General Counsel

EDWARD G. GRUIS
Deputy General Counsel

GORDON M. SHAW
Attorney

FEDERAL MARITIME COMMISSION

Washington, D. C.
December 1, 1971

[Certificate of Service Omitted in Printing]

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* Appendices "A" and "B" represent an exchange of correspondence with respect to the acquisition of Pacific Far East Line by Consolidated Freightways between the Chief of the Commission's Office of Carrier Agreements and the President of PFEL. Appendix "C" is a memorandum dated June 27, 1969, which summarizes the investigation made by the Commission's staff with respect to the acquisition.

APPENDIX

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573
May 19, 1969

Mr. Leo C. Ross
President
Pacific Far East Line, Inc.
141 Battery Street
San Francisco, California 94111

Dear Mr. Ross:

There have been a number of recent reports that Consolidated Freightways is to acquire a majority interest in Pacific Far East Line. So as to enable the Commission to determine whether the Consolidated arrangement falls within the purview of section 15 of the Shipping Act, 1916, we request that you provide us with information regarding any pending proposal for acquisition. We are particularly interested in ascertaining whether any of Consolidated Freightways' operations would make them either a common carrier or another person within the definition of those terms in the Shipping Act.

Any information that you can give us regarding this matter will be appreciated.

Sincerely yours,

/s/ William Levenstein
WILLIAM LEVENSTEIN, *Chief*
Office of Carrier Agreements
(Foreign Commerce)
Bureau of Compliance

PACIFIC FAR EAST LINE, INC.
141 BATTERY STREET
SAN FRANCISCO 94111

June 9, 1969

Mr. William Levenstein, Chief
Office of Carrier Agreements
Bureau of Compliance
Federal Maritime Commission
Washington, D.C. 20573

Dear Mr. Levenstein:

Reference is to your letter of May 19th regarding reports you had received concerning the possible acquisition of a majority interest in Pacific Far East Line, Inc. by Consolidated Freightways, Inc. Your particular interest seems to be whether Section 15 of the Shipping Act of 1916 would in any way be applicable.

The actual consummation of the sale of approximately 51% of PFEL by Natomas and Mr. Ralph K. Davies and associates to Consolidated Freightways, Inc. was May 8, 1969, subject then only to the approval of the Maritime Administration. The Maritime Administration granted its approval on May 29.

The operations of Consolidated Freightways, Inc. in no way qualify them as a common carrier or another person within the definition of those terms as defined in the Shipping Act of 1916. We further state that PFEL has entered into no agreement, written or oral, that comes within the purview of Section 15 of that Act.

Sincerely yours,

/s/ Leo C. Ross
Leo C. Ross

Reply to Response in Opposition to Motion of United States, United States, dated December 3, 1971:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEATRAIN LINES, INC., PETITIONER, v. FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS and PACIFIC FAR EAST LINE, INC. and THE OCEANIC STEAMSHIP COMPANY, INTERVENORS.	No. 71-1093

REPLY TO RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO LODGE MATERIAL AND TO REFER THERETO IN ORAL ARGUMENT

This reply by Respondent, United States of America, is filed pursuant to Rule 6(c) of the General Rules of this Court.

We agree with Counsel for the Federal Maritime Commission that the significance of the matter we wish to lodge with the Court is a question for resolution in the first instance by the Commission. That was the point of our Motion to Lodge: that the significance of the relationship between the control by Consolidated Freightways of PFEL, on the one hand, and the acquisition by PFEL of the Oceanic assets, on the other, should have been evaluated by the Commission. Whether or not the significance was known and considered by the Commission is another matter. The fact that Moody and Fortune publications are available in the Commission's library does not show that the information was known to the Commission. Nor is it shown by the fact that in 1969 the Commission's staff wrote an internal memorandum, and corresponded with PFEL, concerning Consolidated Freightway's control. In any case, whether or not the information was known to the Commission is not as important as whether the Commission evaluated the

significance of this information in relation to the acquisition under consideration. There is nothing in either of the Commission's orders (App. 97, 138) which indicates that it did so. That is why, among other reasons, we suggest that the Commission's peremptory approval of Agreement No. 9903 reflects a failure to evaluate sufficiently the impact of the Agreement.

The motion to lodge and to refer to the material attached thereto should be granted.

Respectfully submitted,

IRWIN A. SEIBEL,
HARRY FIRST,
Attorneys for Respondent
United States of America

Washington, D. C.

December 3, 1971

Order of the Court of Appeals for the District of Columbia Circuit granting Motion of United States, dated December 8, 1971:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 71-1093

SEATRAIN LINES, INC.
PETITIONER

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA
RESPONDENTS

PACIFIC FAR EAST LINE, INC.
INTERVENOR

Before: BAZELON, *Chief Judge*

[United States Court of Appeals for the District of Columbia Circuit, Filed Dec. 8, 1971, Nathan J. Paulson, *Clerk*]

ORDER

On consideration of the motion of respondent United States of America for leave to lodge material and refer thereto on oral argument, and of the responsive pleadings filed with respect thereto, it is

ORDERED that the aforesaid motion is granted and the material attached thereto shall be lodged with the Clerk.

Judgment of the Court of Appeals for the District of Columbia Circuit, dated March 23, 1972:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971.

No. 71-1093

SEATRAIN LINES, INC.
PETITIONER

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA
RESPONDENTS

PACIFIC FAR EAST LINES, INC.
INTERVENOR

Petition for Review of Orders of the Federal Maritime Commission

Before: BAZELON, *Chief Judge*, and MACKINNON and WILKEY, *Circuit Judges*.

[United States Court of Appeals for the District of Columbia Circuit, Filed Mar. 23, 1972, Nathan J. Paulson, *Clerk*]

JUDGMENT

This cause came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel. Supplemental memoranda were thereafter filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Maritime Commission approving Agreement No. 9903 and the order denying a petition to reopen are hereby

vacated, and the Commission is hereby directed to remove the agreement from its docket.

Per Curiam
For the Court:

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Dorothy E. Long, *Deputy Clerk*

Dated: March 23, 1972.

Opinion by Circuit Judge Wilkey.

☆ U.S. Government Printing Office: 1972—492-010/406

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of Agreement No. 9903, dated December 8, 1970, also unreported, appears in Appendix C, *infra*, pp. 55–57.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on March 23, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350.

ISSUE PRESENTED

Whether the Federal Maritime Commission has jurisdiction under Section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, over agreements providing for the acquisition of assets of one carrier by another.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. § 814, provided in pertinent part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number

and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

* * * * *

Every agreement, modification, or cancellation lawful under this section, . . . shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

STATEMENT

1. THE ACQUISITION AGREEMENT

On October 6, 1970, Pacific Far East Line (PFEL) and the Oceanic Steamship Company (Oceanic), common carriers by water in the foreign commerce of the United States, submitted to the Federal Maritime Commission (Commission) an agreement providing for the sale and transfer to PFEL of four Oceanic vessels in current operation and its interest in two ships under construction. The transfer agreement also included all personnel and shoreside equipment and facilities of Oceanic related to the vessels. While all of its assets were included in this transfer, Oceanic, a wholly-owned subsidiary of Matson Navigation Company, was to retain its corporate existence and was not prohibited from re-entering its former trade or any other trade. The transfer agreement was submitted for Commission determination as to whether it was subject to the approval requirements and anti-

trust immunity under Section 15 of the Shipping Act, 1916.

Notice of the agreement was published in the *Federal Register* on October 14, 1970. On October 21, 1970, Seatrain Lines, Inc., also a common carrier by water in the United States foreign commerce, protested approval of the agreement and requested a hearing.

2. FMC PROCEEDINGS

On October 27, 1970, the Commission denied Seatrain's request for hearing and approved the agreement (Agreement 9903).[1] Whereupon, Seatrain sought reopening for reconsideration of the Commission order of approval. On December 8, 1970, the Commission denied the motion for reconsideration on the ground that Seatrain had raised nothing to show that approval had been improper.

3. COURT PROCEEDINGS

On February 8, 1971, Seatrain petitioned the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 2342(3) for review of the

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[1] Denial of the request for hearing and approval of the agreement was predicated on Seatrain's failure to show any likelihood of injury as a result of such approval since Seatrain's entry into the trade in question was merely prospective and nothing in the agreement would preclude such entry at a future time. While the opinion below notes its failure to hold a hearing [App. A at 48, Slip Op. at 32], the Commission acting on the holding in *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F. 2d 577 at 587 (D.C. Cir. 1969)—"if no substantial issues are raised it may then be proper for the Commission to proceed and approve the agreements"— found that Seatrain's protest presented no real, immediate or substantial issue. See App. B at 53.

Commission's order approving the agreement. The principal basis for Seatrain's petition was that the Commission erred in failing to hold a hearing prior to approval of the agreement despite Seatrain's timely protest. However, the Department of Justice, statutory respondent representing the United States and challenging the Commission's Section 15 authority over mergers and acquisitions between ocean-going carriers in another proceeding,[3] again raised the jurisdictional question as to whether the Commission's statutory authority covered the acquisition by PFEL

[3] In *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971), the Commission's Section 15 authority over acquisitions and mergers and its primary jurisdiction under the doctrine of *Far East Conference* v. *Unied States*, 342 U.S. 570 (1952), was challenged by the Department of Justice, which brought an antitrust action in the District Court of New Jersey to enjoin the implementation of an agreement then pending before the Commission, the proposed acquisition of United States Lines, a common carrier by water, by R. J. Reynolds Tobacco Company, parent company of another carrier by water, Sea-Land Service, Inc. While permitting the Commission to intervene in the antitrust action, the District Court refused to dismiss or stay its proceeding pending the outcome of the Commission's hearing on the acquisition, and in a written opinion held that Section 15 of the Shipping Act did not give the Commission authority over mergers and acquisitions in the shipping industry. A petition for writ of certiorari to review this District Court decision is now pending before this Court in *R. J. Reynolds Tobacco Company, et al.* v. *United States and Federal Maritime Commission*, No. 71-157. Although the same jurisdictional question is raised by the *Reynolds Tobacco Co.* petition for writ of certiorari to review the interlocutory decision of the District Court of New Jersey, the instant case, unlike *Reynolds*, is fully postured for complete review by this Court since all administrative and judicial proceedings have been concluded.

of Oceanic's assets. Focusing on this question, the Court of Appeals concluded "* * * that it is not the Federal Maritime Commission which has the duty to approve or disapprove the type of contract made the subject of this litigation." App. A at 49, Slip Op. at 33. Having so ruled, the court found it unnecessary to reach any of the other issues raised in the proceeding.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN CONFLICT WITH THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In holding that Section 15 does not give the Commission authority to consider mergers and acquisitions, Judge Wilkey, speaking for the D.C. Court of Appeals, has ruled contrary to the opinion of the Ninth Circuit Court of Appeals in *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F. 2d 796 (9th Cir. 1968), where it was held that a merger of three steamship lines was subject to the Commission's Section 15 jurisdiction.[8] In explaining this conflict with the Ninth Circuit Court majority, the court below viewed the *Matson Navigation* opinion as not giving proper consideration to the legislative history of the Shipping Act and misapplying what this Court has described as Section 15's "expansive language" to cover "the myriad of restrictive agreements in the

[8] The D.C. Court of Appeals' decision, however, is in accord with Judge Garth's opinion in *Reynolds Tobacco Co.*, *supra*.

maritime industry." *Volkswagenwerk A.G.* v. *Federal Maritime Commission*, 390 U.S. 261, 273–76 (1968). App. A at 47, 48, Slip Op. 31, 32. Initially, it would seem that Section 15's plain language is sufficiently clear to support the Commission's interpretation of that section.[4] What this section requires is simply that any person subject to the Shipping Act must file with the Commission for approval "every agreement with another * * * person subject to this [Act] * * * controlling, regulating, preventing, or destroying competition." That the effects of the merger and acquisition agreements between competing carriers would be the controlling, regulating, preventing or destroying of competition cannot be challenged.

Notwithstanding the plain import of the language of Section 15, the legislative history of that section nowhere establishes or specifies another or contrary interpretation. For as stated unqualifiedly by this Court, but not so accepted by the court below, "[n]othing in the legislative history suggests that Congress, in enacting Section 15 of the Act, meant to do less than follow this recommendation of the *Alexander Report* [that all 'agreements' be filed for approval with the FMC] and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry."[5]

The court below incorrectly states that the Congressional Committee investigating the malaise of the

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[4] *Agreement No. T–4: Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521 at 531 (1965).

[5] 390 U.S. 261, at 276.

shipping industry in 1914 "had neither sought information nor had discussion on ship sale agreements. They were neither a part of the problem nor part of the solution." App. A at 32, Slip Op. at 16. The 1913 House Resolution empowering the Committee investigation of this industry contained no such limitations in providing:[6]

> *Resolved*, That the Committee . . . be and is hereby, empowered and directed to make a complete and thorough investigation of the methods and practices of the various ship lines . . . and the connection between such ship lines . . . and other common carriers . . . and to investigate whether any such ship lines have formed any *agreements*, understandings, working arrangements, . . . or other *combinations* among one another . . . for the *purpose of preventing or destroying competition* . . . also to investigate and report to what extent any vessel lines . . . are owned or controlled by other ship lines or companies. [Emphasis added].

The product of that Committee investigation was the *Alexander Report* (named after the Committee's Chairman, Representative J. W. Alexander),[7] which served as the foundation for the 1916 enactment of the Shipping Act. The *Alexander Report* plainly indicates a strong Committee interest in control by acquisition as a public policy problem, particularly in the intercoastal and Great Lakes trade, and such ac-

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[6] H.R. 587, 62d Cong., 2d Sess. (1913).

[7] H.R. Doc. 805 [*Alexander Report*], 63d Cong., 2d Sess., 1914.

quisitions in the domestic trade are itemized and treated at length in the Report.[8]

Concededly, the Committee did not solicit the same merger and acquisition information from carriers in the foreign trade as from those in the domestic trade. This, however, was due to no oversight by the Committee; rather, it was felt that in the foreign trade destruction of competition was effected primarily by conference agreements through which members used *inter alia,* rate regulations, sailing allocations, freight volume limitations, freight receipt pools, rebate payments and fighting ships to attenuate the competitive atmosphere. See *Alexander Report* at 420–21. In summing up its findings in the foreign trade, the Committee did not limit its recommendation to the regulation of conference arrangements only, but concluded:

> (2) That all carriers engaged *in the foreign trade of the United States,* parties *to any agreements, understandings, or conference arrangements* hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements . . . *entered into* (*1*) *with any other steamship companies,* firms, or lines. . . . [Emphasis added]. *Alexander Report, supra,* at 419.

With this clear indication of the concern and comprehensive coverage intended by the Committee, Congress certainly would not have overlooked or neglected to exclude from regulation acquisitions by carriers in foreign commerce without so indicating in either the *Alexander Report,* the debates which followed, or by

[8] *Id.*, pp. 317–46, 369–89.

express exemption in the Shipping Act. As enacted in 1916, Section 15 was equally applicable to both the domestic and foreign trade.

2. THE DECISION IN THE COURT BELOW CONSTITUTES A MISAPPLICATION OF THIS COURT'S RATIONALE IN *VOLKSWAGENWERK A.G.* V. *FEDERAL MARITIME COMMISSION*, 390 U.S. 261 (1968)

In deciding that "agreements other than those of a continuing nature" were not meant to be subject to the Commission's jurisdiction, the D.C. Court of Appeals noted, but refused to follow, the mandate of this Court giving Section 15's coverage broad construction. As clearly stated by this Court in *Volkswagenwerk, supra,* at 273–276, Section 15 "uses expansive language" and should be construed broadly so as to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." Given such guidelines, the Ninth Circuit Court correctly concluded in *Matson Navigation, supra,* at 800, that merger agreements were plainly encompassed by Section 15.

The court below, however, takes a restrictive view of the guidelines set forth in *Volkswagenwerk* and regards them as confined to "cooperative working arrangements" involved in that case.* According to the court, such arrangements would not "include 'merg-

*The arrangement in issue in *Volkswagenwerk*, which the Commission itself thought was outside of the ambit of Section 15, consisted of an agreement by members of an employer bargaining association providing for the assessment of its membership for a union trust fund.

ins,' 'acquisitions,' and like ilk, such as the sale of all assets in the case at bar." App. A at 47, Slip Op. at 31. In support of this limited Section 15 application, the Court of Appeals looks to the seventh category of agreements enumerated in that section, which states: "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." Instead of placing this seventh and final category on parity with each of Section 15's other six categories to insure that no one of the "myriad of restrictive agreements" prevalent in the shipping industry would escape Commission attention, the court below misconstrues it as being "intended merely to summarize the type of agreements covered [by the preceding six categories] * * * and not to include those of an entirely different nature, such as involved here. * * *" App. A at 21, 22, Slip Op. at 5, 6. Under the court's interpretation, six of the seven categories of Section 15 then become superfluous. Such a construction of the seventh category of agreements has been rejected by this Court as well as the Ninth Circuit Court of Appeals. 390 U.S. at 275, n. 23; 405 F. 2d at 799, n. 7.

The rule that antitrust laws are not repealed by implication is also relied upon by the court for limiting Section 15's application in this case. App. A at 23, 24, Slip Op. at 7, 8. But this too is answered in *Volkswagenwerk*, where it is clear that the rule should not be applied to cancel out the expansive scope of Section 15 particularly when the Commission is charged with considering antitrust implications in determining whether a Section 15 agreement should receive approval. 390 U.S. at 273–74.

3. THE DECISION OF THE COURT BELOW DEFEATS THE AIMS AND POLICY OF THE SHIPPING ACT IN LEAVING SHIPPING INDUSTRY ACQUISITIONS SUBJECT ONLY TO ANTITRUST LAWS

A fundamental objective of the Shipping Act, 1916, repeatedly stressed by this Court, was to create an administrative body with maritime expertise to regulate ocean shipping. *Far East Conference* v. *United States, supra,* at 573–76; *United States Navigation Co.* v. *Cunard S.S. Co., Ltd.,* 284 U.S. 474, 485 (1932). Unless such regulatory jurisdiction also included authority over consolidations, mergers and acquisitions by and among, industry members, regulation by the expert agency would be greatly curtailed, if not completely nullified, in many cases. As pointed out by Judge Merrill in *Matson Navigation, supra,* at 800:

> The direct and destructive impact upon competition which may result from a merger [in the shipping industry] renders it the kind of arrangement as to which expert scrutiny most clearly is to be desired. On the other hand, to leave enforcement of antitrust policy in such cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements contrary to the intent of the Shipping Act that industry considerations must be taken into balance in judging industry arrangements.

With respect to acquisition and merger transactions occurring in the shipping industry, therefore, Commission expertise must be called upon to reconcile con-

fecting national policies represented by the Shipping Act and the antitrust laws. While it is authorized by Section 15 to immunize transactions from application of the antitrust laws, the Commission cannot exercise this power loosely. As described by this Court in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968), shipping restraints which interfere with the policies of the antitrust laws are entitled to Commission approval only if it is shown that such restraints are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." The public interest in such overriding industry considerations, however, would be sacrificed if merger and acquisition transactions in the shipping industry were open to attack by either the Federal Trade Commission or the Department of Justice, and the legality of such transactions measured solely by competitive standards under the antitrust laws. Yet, this is precisely the approach urged by the court below. App. A at 48, Slip Op. at 32. The Court of Appeals opinion suggests that the "Maritime Commission should be free to intervene on behalf of the 'industry viewpoint'" in antitrust proceedings brought by the Federal Trade Commission or the Justice Department. However, since these latter agencies could not depart from competitive standards in the prosecution of shipping industry mergers and acquisitions, little attention or relevance would be given to such other industry or Shipping Act considerations. With mergers and acquisitions being

thus controlled by antitrust principles, there would be no opportunity for the public policy objectives of the Shipping Act to prevail.

For this regulatory body, jurisdiction over mergers and acquisitions is a vital and important tool in the mechanism of regulation under the Shipping Act. Without it, the thrust of Section 15 of the Act would be severely curtailed with respect to agreements "controlling, regulating, preventing, or destroying competition," of which mergers and acquisitions are clearly two of the most powerful.

In suggesting that the Commission can be ousted from jurisdiction and the aims and objectives of the Shipping Act frustrated by the simple expedient of omitting "on-going" or "continuing" arrangements in drafting agreements of sale or merger in the shipping industry, the court below acknowledges its tenuous position, thusly:

> We recognize that there is a certain apparent inconsistency (more apparent than real) in holding that the parties are not required to file with the Commission and the Commission is not required to approve or disapprove a simple contract for the sale of ships and all assets, and yet a similar contract coupled with an agreement not to compete, which may involve more complicated antitrust issues than the more simple sale contract, is required to be filed and the Commission may have jurisdiction to pass on all questions, including antitrust issues. App. A at 43, Slip Op. at 27.

If instead of an outright purchase of Oceanic's vessels in the present case, PFEL had entered into a

long term charter (10–15 years), or coupled the purchase agreement with a covenant not to compete, the acquisition agreement, according to the court below, would have been subject to the Commission's Section 15 jurisdiction. Such an "on-going" arrangement would have little or no different effects under the shipping and antitrust statutes.

Thus, by altering the actual mechanics of an acquisition or merger, the form rather than the substance of the transaction would control the ultimate disposition of any administrative or judicial proceeding. Such a result is judicially unsound and administratively undesirable.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered on March 23, 1972.

Respectfully submitted.

JAMES L. PIMPER,
General Counsel,
EDWARD G. GREUB,
Deputy General Counsel,
DAVID FISHER,
Attorney,
Federal Maritime Commission.

JUNE 20, 1972.

WASHINGTON, D.C.

I AUTHORIZE THE FILING OF THIS PETITION FOR A WRIT OF CERTIORARI.

ERWIN N. GRISWOLD,
Solicitor General.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1093

SEATRAIN LINES, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PACIFIC FAR EAST LINES, INC., INTERVENOR

Petition for Review of Order of the Federal Maritime Commission

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Decided March 23, 1972

Mr. Paul M. Tschirhart, with whom *Mr. Marvin J. Coles* was on the brief, for petitioner.

Mr. Gordon M. Shaw, Attorney, Federal Maritime Commission, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Messrs. James L. Pimper*, General Counsel, and *Edward G. Gruis*, Deputy General Counsel, Federal Maritime Commission, were on the brief, for respondent Federal Maritime Commission.

Mr. Irwin A. Seibel, Attorney, Department of Justice, for respondent United States of America.

Mr. Odell Kominers, with whom *Mr. Stephen F. Eilperin* was on the brief, for intervenor.

Before BARNES, *Chief Judge*, and MACKINNON and WILKEY, *Circuit Judges*.

WILKEY, *Circuit Judge*: Whether the Federal Maritime Commission acted in accordance with its statutory mandate in approving Agreement No. 9903, calling for the acquisition of all the assets of one carrier by water by another, is the principal issue presented for review. Whether the Commission had jurisdiction to act is necessarily the seminal question; the answer we reach here pretermits all other issues.

Our answer is not reached without difficulty. In addition to the expected divergent views of the private parties, we find the Federal Maritime Commission and the Department of Justice (representing the statutory respondent United States) on opposite sides of the jurisdictional issue. And, as we shall see later, the four United States judges who have considered the question have divided evenly. For the reasons set forth below, which to us seem persuasive, we hold the Commission here lacks the requisite jurisdiction.

I. *The Agreement, the Statute, and the Issue*

Seatrain Lines, Inc., petitions for review and reversal of the Federal Maritime Commission's approval without a hearing of Agreement No. 9903 between Pacific Far East Line, Inc., and Oceanic Steamship Company, covering the sale by Oceanic of its entire fleet of four vessels, currently in service in the North American Pacific Coast-Australasian Trade (Trade Route 27), as well as Oceanic's interest in two containerships still building in the United States

with the aid of construction-differential subsidy. Included in the sale of these assets are transfers of Oceanic personnel and all shoreside equipment to Pacific Far East Line. This sale comprises all of Oceanic's assets, although Oceanic, a wholly-owned subsidiary of the Matson Navigation Company, retains its corporate existence and is not restricted by the agreement from re-entering the North American Pacific Coast-Australasian or any other trade.

The question presented at the outset is whether this agreement falls within the scope of the Commission's[1] jurisdiction as defined by the Shipping Act of 1916.[2] As enacted, Section 15 of the Act provided in relevant part as follows:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the board [now the Commission] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part,
>
> [1] fixing or regulating transportation rates or fares;
>
> [2] giving or receiving special rates, accommodations, or other special privileges or advantages;
>
> [3] controlling, regulating, preventing, or destroying competition;
>
> [4] pooling or apportioning earnings, losses, or traffic;

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[1] The "Commission" refers to the Federal Maritime Commission [75 Stat. 840 (1961)] and its predecessors, the United States Shipping Board [39 Stat. 728, 729, 733. (1916)]; the United States Shipping Board Bureau of the Department of Commerce [Exec. Order No. 6166, § 12 (1933)]; the United States Maritime Commission [49 Stat. 1985 (1936)]; and the Federal Maritime Board [64 Stat. 1273 (1950)].

[2] 7 Sept. 1916, Ch. 451, § 1, 39 Stat. 728, *as amended* 46 U.S.C. §§ 801-842.

[5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

[6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;

[7] or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board [now the Commission] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between . . .

Agreements existing at the time of the organization of the board [now the Commission] shall be lawful until disapproved by the board. . . .

. . . Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.[8]

While the agreement here at issue may at first impression be thought to fall within the third category—"controlling, regulating, preventing, or destroying competition"—inasmuch as the sale by Oceanic to Pacific Far East Line of all of its assets has the effect of eliminating Oceanic, at least for the present, from the North American Pacific Coast-Australasian trade, both the language and context

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[8] *Id.* § 814, *as amended* 3 Oct. 1961, Pub. L. 87-346, § 2, 75 Stat. 763; 29 Feb. 1964, Pub. L. 88-275, 78 Stat. 148.

of Section 15 itself and the legislative history accompanying it demonstrate that this particular agreement is not covered.

II. *The Statute's Treatment of Antitrust Considerations*

A. *Specific Language of Section 15.*

The language of Section 15 is concerned with the implementation of "agreements," which definitely "includes understandings, conferences, and other arrangements," among common carriers by water. The first six categories specified in Section 15 refer to agreements which of necessity imply the continued existence of the parties and their participation in such agreements over time (*e.g.*, fixing or regulating rates; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting sailings between ports, etc.). In the case at bar, however, Oceanic is eliminated from the North American Pacific Coast-Australasian trade (as well as any others), at least until it decides to re-enter the trade by acquiring vessels and related personnel and equipment. The seventh category is intended merely to summarize the type of agreements covered—those "in any manner providing for an exclusive, preferential, or cooperative *working* arrangement";[4] and

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[4] *Id.* (emphasis added). Our interpretation of the seventh category of Section 15 parallels that of the Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), with respect to the fourth category of Section 14 of the Shipping Act. The Court, after discussing the specific prohibitions of the first three categories of Section 14, made this analysis:

> Therefore, coordinate with these three clauses aimed at specific practices, a fourth category, couched in general language, was added: "resort to other discriminating or unfair methods. . . ." In the context of § 14 this clause must be construed as constituting a *catchall* clause by which Congress meant to prohibit other devices not specifically enumerated but *similar in purpose and effect*

not to include those of an entirely different nature, such as involved here—the acquisition of all the assets of one common carrier by water by another—which can hardly be considered mere "working arrangements."

This view is supported by the language in the second and third paragraph, immediately following paragraph one, in Section 15. The second paragraph authorizes the Commission to disapprove, cancel or modify any agreement "whether or not previously approved" by it which it finds to be unjustly discriminatory. The third paragraph in Section 15 declares existing agreements lawful "until disapproved by the Commission." Both of these paragraphs of Section 15 undeniably envision agreements which are amenable to continuing Commission supervision. If changing conditions warrant it, the Commission may find a working arrangement hitherto not considered unfair to be unjustly discriminatory, and thus order its dissolution or modification. In the case of arrangements of a more permanent nature such as here involved, the sale of all the assets of one common carrier by water to another, subsequent Commission cancellation or modification of such a previously approved arrangement would be very difficult if not impossible to implement. The whole structure of Section 15, not only the first paragraph listing the type agreements covered, shows an intent to grant the Commission authority to deal with agreements of a continuing nature.[1]

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to those barred by § 14, First, Second, and the "retaliate" clause of § 14 Third.

(*Id.*, at 492 (emphasis added)).

[1] This view is also supported by a contemporary comment on the type of agreements covered by the newly-enacted Section 15 of the Shipping Act of 1916: "Perhaps the most important of these [provisions of the Act] is § 15, which exempts from the operation of the anti-trust laws pooling, rate, and other *co-operative* agreements, which have been filed with and approved by the Board [now the Commission]." "Cur-

B. *Standards By Which the Statute Is Construed.*

Aside from the specific language of Section 15, a contrary reading of its scope regarding agreements covered is likewise not warranted in view of the fundamental import of the nation's antitrust policies, expressed by Congress in a variety of legislative enactments, primarily the Sherman Act.[6] The Supreme Court has "long recognized that the antitrust laws represent a fundamental national economic policy . . ."[7] and stated that "[r]epeals of the antitrust

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rust Legislation—Government Regulation of Private Shipping," 17 Colum. L. R. 357, 358 (1917) (emphasis added).

[6] 15 U.S.C. §§ 1-7, *as amended* 17 Aug. 1937, Ch. 690, Title VIII, 50 Stat. 693; 7 July 1955, Ch. 281, 69 Stat. 282. While Section 7 of the Clayton Act, 15 U.S.C. § 18, *as amended* 29 Dec. 1950, Ch. 1184, 64 Stat. 1125, prohibiting the acquisition by one corporation of the stock or assets of another where it tends substantially to lessen competition or to create a monopoly, states that "[n]othing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . United States Maritime Commission [now the Federal Maritime Commission] . . . under any statutory provision vesting such power in such Commission . . .," the Supreme Court held that "[t]he words 'transactions duly consummated pursuant to authority' given [the Commission] under any statutory provision vesting such power' in it are plainly not a grant of power to adjudicate antitrust issues," since Congress did not intend in Section 7 to confer on any agency mentioned therein "any authority or powers which it does not already possess." *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962).

[7] *Carnation Co.* v. *Pacific Conference*, 383 U.S. 213, 218 (1966). In view of the Court's holding in *Carnation* that agreements unapproved by the FMC are beyond the immunity afforded by the Shipping Act (383 U.S. at 224), then obviously agreements not within the authority of the FMC to approve are beyond the immunity offered by the Shipping Act as well. See Comment, "Accommodations of Antitrust Law and Ocean Shipping Regulation," 4 Texas Int'l L. Forum 398, 405 (1968).

laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[8] Even where Congress has granted exemptions from the antitrust laws, the Court has held that it is "bound to construe them strictly, since . . . [they are] restrictive of a free economy."[9] With specific reference to situations such as that presented by the case at bar, the Court has stated that it "cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."[10]

This court has recently applied this principle, and in so doing observed:

> . . . [T]he basic philosophy of our antitrust policy has been so long established, is of such recognized economic importance, and has assumed in the statutory scheme of things such high dignity that a contrary congressional intent or "immunity from the antitrust laws 'is not lightly implied.'"
>
> . . . [T]he proper inquiry [in cases such as this one] would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws. . . .
>
> Putting the problem in this light, relevant criteria would include the specific language of the congressional statute involved, any legislative history which would throw light on the congressional intent, the relative importance of the governmental action which is asserted to override antitrust policy, whether the governmental agency is required to take into con-

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[8] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963) (footnotes omitted).

[9] *United States* v. *McKesson & Robbins*, 351 U.S. 305, 316 (1956).

[10] *Carnation Co.* v. *Pacific Conference*, 383 U.S., at 218.

sideration the possible anticompetitive effect of its actions, whether the agency is required to adhere to a clearly defined and restricted statutory directive, and to what extent the agency's actions are subject to judicial review.[11]

In the same case, this court, in considering federal government regulation of business, stated with specific reference to the scope of the Federal Maritime Commission's authority to grant exemptions from the antitrust laws:

> The maritime industry operates under the power of the Federal Maritime Commission specifically to grant exemptions from the antitrust laws. This power is not to be exercised loosely, hence in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien (Swedish American Line)* the [Supreme] Court upheld the Commission regulation that shipping "conference restraints which interfere with the policies of the antitrust laws will be approved *only* [emphasis in original] if" the conference can show that they are "required by a serious transportation need, necessary to secure important public benefits *or in furtherance of a valid regulatory purpose of the Shipping Act.*"[12] (Emphasis added.)

C. *Language of Contemporary Statutes.*

As the Supreme Court has recognized in regard to exemptions from the antitrust laws, "[i]f Congress had desired to grant any further immunity, Congress would doubtless have said so."[13] This view is supported by an examination of two contemporary statutes of the Shipping Act: Enacted in 1912, the Panama Canal Act in amending Section 5 of the Interstate Commerce Act dealt

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[11] *Hecht* v. *Pro-Football, Inc.*, ——U.S.App.D.C. ——, 444 F.2d 931, 935 (1971) (footnotes omitted), *cert. denied* 17 January 1972).

[12] *Id.*, at 942 (footnotes omitted).

[13] *United States* v. *Borden Co.*, 308 U.S. 188, 201 (1939); see also *Hecht* v. *Pro-Football, Inc.*, *supra*, note 11.

specifically with interlocking ownership or control of common carriers by water by making it unlawful for any railroad "to own, . . . control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere" with which the railroad may compete;[14] enacted in 1914, Section 7 of the Clayton Act speaks in terms of the "acquisition by one corporation of the [whole or any part of the] stock of another" and is directed at controlling corporate mergers.[15]

It is highly unlikely, in view of this specific statutory treatment by Congress of the antitrust implications of acquisitions of corporate control, that Congress originally intended to exempt such acquisitions under Section 15 of the Shipping Act by making no specific reference to them but simply by including them under the rubric "agreement." On the contrary, the silence of Congress in Section 15 with respect to the subject of acquisition of control or ownership can only be taken to mean that Congress had no intention by the Shipping Act of 1916 to exempt such arrangements from the normal administration of the antitrust laws. The Federal Maritime Commission's attempt to derive a contrary affirmative intent on the part of Congress from its silence is not a favored method of statutory interpretation.[16]

It would therefore be illogical to read the language of Section 15 as applying to agreements other than those

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[14] 24 Aug. 1912, Ch. 390, § 11, 37 Stat. 566, 49 U.S.C. § 5 (14).

[15] 15 Oct. 1914, Ch. 323, § 7, 38 Stat. 731, 15 U.S.C. § 18.

[16] *Cleveland* v. *United States*, 329 U.S. 14, 23–24 (concurring opinion) (1946), and cases cited therein; *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656, 662 (1971).

which provide for "exclusive, preferential, or working arrangements," since to do so would be to change the clear intent of Congress as to the usual standards and responsibility for administration of the antitrust laws without specific language so requiring. This is by no means intended to denigrate the functions of the Federal Maritime Commission with respect to cooperative working agreements among common carriers by water; rather it is designed simply to delineate the appropriate scope for such functions in light of other significant national concerns, here the antitrust laws.

On the face of the statute, the language of Section 15 does not vest the Commission with jurisdiction over the type of agreement here at issue—the acquisition of all the assets of one common carrier by water by another carrier. This is not to say, or imply, that this agreement must therefore of necessity be considered void as violative of the antitrust laws. Whether it should be considered valid or invalid is a matter for evaluation first by the appropriate antitrust enforcement agency, and subsequently if a dispute arises by the courts.

III. *The Legislative History of the Shipping Act of 1916*

A. *Congressional Action 1914 to 1916.*

Besides the specific language of Section 15 itself, the legislative history accompanying the Shipping Act of 1916 lends support to the view that Congress did not intend to vest the Federal Maritime Commission with jurisdiction over the type of agreement involved in the case at bar. The work of the House Committee on the Merchant Marine and Fisheries of the 63d Congress, under the direction of its Chairman, Representative J. W. Alexander, formed the basis for the enactment of the Shipping Act. As the Supreme Court described it, "[this Committee] undertook an exhaustive inquiry into the practices of

shipping conferences. The work of this Committee is set forth in two volumes of hearings, a volume of diplomatic and consular reports, and a fourth volume containing the Committee's report, known as the Alexander Report."[17] The Alexander Report includes a questionnaire sent to the steamship lines engaged in the American foreign trade, inquiring into cooperative working arrangements with other lines and railroads.[18] As the Report itself summarizes:

> The facts contained in the foregoing report show that it is almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements, or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulating of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report. . . . The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as pre-

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[17] *Federal Maritime Board* v. *Isbrandtsen Company, Inc.*, 356 U.S. 481, 488 (1958) (footnotes omitted) (emphasis added), citing to House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63d Cong., 2d Sess. (1914).

[18] House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63d Cong., 2d Sess. 13-14 (1914).

sented to the Committee by steamship line representatives and the exporting and importing interests of the United States . . .[19]

As the foregoing indicates, the subject of the Committee's investigations was "agreements, conference arrangements, [and] gentlemen's understandings," all of which envision the continued existence of the parties and their participation in such agreements (*e.g.*, in fixing rates, apportioning traffic, pooling earnings, etc.).[20] There is no intention on the part of the Committee to include, nor is there any language in fact so including, the type of arrangements involved in the case at bar—the acquisition of *all* the assets of one steamship line by another. The Committee employed terms other than the word "agreement" to refer to transactions not of a continuing nature:

> The numerous methods of controlling competition be-

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[19] *Id.*, at 415.

As Judge Garth noted with respect to the subject of the Committee's inquiry:

> The catalog or "full classification of these agreements" (i.e., the "agreements" to which the Alexander Committee's attention was primarily directed and to which its recommendations were exclusively directed) does not include a single agreement of merger or other corporate reorganization. The "agreements" represented in the Report are all "on-going" in nature. Most of these "agreements" are cooperative working arrangements. These "agreements" describe practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time. None of the "agreements" studied by the Alexander Committee bears the slightest resemblance to an agreement of merger, which is essentially *a single, discrete event*, which transforms the relationship of the merging parties at the instant of merger.

United States v. *R. J. Reynolds Tobacco Company*, 325 F. Supp. 656, 658–59 (1971) (emphasis added).

[20] *Id.*

tween water carriers in the domestic trade, referred to in the preceding pages, may be grouped under three headings, viz., (1) control through *acquisition* of water lines or the *ownership* of accessories to the lines; (2) control through agreements or understandings; and (3) control through special practices."[21]

It would be superfluous, then, for the Committee to have made this distinction if the Commission were correct in asserting that the Committee used the term "agreement" to encompass transactions other than those constituting cooperative working arrangements.[22]

The Committee recommended against a complete prohibition of cooperative working arrangements among steamship lines since it found that, in the absence of such agreements, rate wars would occur which would have the ultimate effect of eliminating the weaker lines through failure or consolidation.[23]

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[21] *Id.*, at 409. (emphasis in original).

[22] See *United States* v. *R. J. Reynolds Tobacco Co.*, *supra*, note 19.

[23] The Committee recommended:

(2) That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies. . . .

Alexander Report, *supra*, note 18, at 419–20.

As the Committee noted:

Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between

In order to forestall the outbreak of rate wars, the Committee concluded that "the several [steamship] lines in any given trade [should be permitted] to cooperate through some form of rate and pooling arrangement under Government supervision and control."[34] The Committee went on, however, to find that "[w]hile admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision."[35] To this end, it urged, *inter alia*, that parties to such agreements be required to file for approval with the appropriate governmental authorities a copy of

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> the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership . . . . [E]ither would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.

Id., at 416.

The Committee also found that prohibiting such working agreements among steamship lines

> . . . would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. . . .

Id.

[34] See note 18, *supra*, at 416.

[35] *Id.*

all agreements with other lines engaged directly or indirectly in the American trade or with American shippers, railroads or other transportation agencies."[30]

The clear tenor of the Committee's analysis, the problems it faced and the solution it proposed, all related to agreements of a continuing nature. Section 15 embodied the Committee's solution; the "arrangements" it had considered were to be placed under government "supervision and control." The Committee had neither sought information nor had discussion on ship sale agreements. They were neither part of the problem nor part of the solution.

Congress, in enacting the Shipping Act of 1916, followed the basic recommendations of the House Committee on the Merchant Marine and Fisheries as contained in the Alexander Report.[31] It is clear, then, that Congress intended to tolerate only the minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines by the method of government supervision of anticompetitive working arrangements. While Congress recognized that in order to accomplish this result a measure of competition might have to be sacrificed, such as permitting agreement on rates or pooling of earnings, it did not intend thereby to remove all effective competition or to have those agreements permitted under Section 15 of the Shipping Act be considered as permanent in every

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[30] *Id.*, at 419–20.

[31] As the Court in *Federal Maritime Board* v. *Isbrandtsen Company, Inc.*, *supra*, noted "[t]he Alexander Report was submitted in 1914 to the 63d Congress and a bill to carry out its recommendations was introduced but not passed. H.R. 17328, 63d Cong., 2d Sess. In the following Congress substantially the same bill was reintroduced, H.R. 15455, 64th Cong., 1st Sess., and became the Shipping Act of 1916." 356 U.S., at 490, n.11.

instance. Congress preserved ample room for competition in a variety of areas other than rates, especially those which relate to the quality of service provided by the various steamship lines.[28] Congress also provided that the agreements permitted under Section 15, none of which are invariably permanent, may be cancelled or modified by the Commission in the event changing circumstances warrant.

B. *Congressional Action or Non-Action Since 1916.*

The Commission contends that Congress has indicated by its actions *subsequent* to the enactment of the Shipping Act in 1916 that Section 15 provides the FMC with authority to approve, and thereby exempt from the antitrust laws, not only agreements of a continuing nature

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[28] The following indicates the range of non-price competition:

> If we assume, theoretically, that the members of a conference adhere strictly to their agreement, then they must compete with each other on a so-called nonprice basis. Better service would appear to be the principal inducement to offer to shippers in an effort to obtain their patronage. This means offering faster, more convenient schedules, and special facilities for cargo handling—*e.g.*, refrigerated space. However, even speed may be ruled out as a competitive factor. In some conferences, rates have been geared to speed—the slower the vessel the lower the rates. Actually competition often goes beyond these theoretical confines. Violations of agreements occur and competition intrudes on rates. The abuses will persist so long as they are not flagrant or discovered by disadvantaged "clean" competitors. Such "shadings" of the rules are difficult to eliminate in an arrangement based on self-interest but calling for self-discipline. Competition among conference members is often intense, depending upon conditions in the trade.

Gorder, *United States Shipping Policy*, 148 (1956) (footnote omitted); see also Marx, *International Shipping Conferences*, 250–251 (1953).

but also those such as presented by the case at bar—a sale of all assets of one common carrier by water to another.

In support of this assertion the Commission points first to the 1950 amendment of Section 7 of the Clayton Act. Section 7, which prohibits the acquisition by one corporation of the stock or assets of another where it tends substantially to lessen competition or to create a monopoly, provides:

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . [listing various regulatory agencies] . . . United States [now Federal] Maritime Commission . . . under any statutory provision vesting such power in such Commission, Secretary, or Board.[29]

The Commission then refers to the legislative history accompanying the 1950 amendment of Section 7, in which the Senate Committee on the Judiciary stated: "The purpose of the amendments is to include in the bill the recommendations of the United States [now Federal] Maritime Commission [to the effect that transactions duly consummated pursuant to the Commission's authority are exempted from the bill] . . . ."[30] The FMC neglects to add, however, that the Senate Report noted that the proposed bill then before the Senate differed from the bill as passed by the House in the following manner:

> . . . (2) The Maritime Commission, at its request, has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. *In making this addition, however, it is not*

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[29] 15 U.S.C. § 18, *as amended* 29 Dec. 1950, Ch. 1184, 64 Stat. 1125.

[30] S. Rep. No. 1775 (to accompany H.R. 2734), 81st Cong., 2d Sess. (1950), 2, in which the Senate Judiciary Committee repeats in substance H.R. Rep. No. 1191 (to accompany H.R. 2734), 81st Cong., 2d Sess. (1949).

> *intended that the Maritime Commission*, or, for that matter, any other agency included in this category, *shall be granted any authority or powers which it does not already possess.*[31]

The Commission's argument that Congress would not have included the FMC in the exemption provision in the 1950 amendment of Section 7,[32] if the Commission had no authority whatever with respect to acquisitions, is a bootstrap attempt to derive a positive statutory grant of authority from what is merely a list of agencies whose then-existing authority Congress did not intend to affect, either affirmatively or negatively. That effort has been rebuffed in advance by the Supreme Court: "The words 'transactions duly consummated pursuant to authority' given [the Commission] 'under any statutory provision vesting such power' in it are plainly not a grant of power to adjudicate antitrust issues," since Congress did not intend by Section 7 to confer on any agency mentioned therein "any authority or powers which it does not already possess."[33]

Of course, as we have made amply clear above, the Commission *does* have authority in regard to some types

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[31] *Id.*, S. Rep. No. 1775, at 7 (emphasis added).

[32] Brief in Reply for Respondent, Federal Maritime Commission, p. 11.

[33] *California* v. *Federal Power Commission*, 369 U.S. 482, 486 (1962). That the FMC itself was aware of Congress' intent with respect to Section 7 is evident from the letter of the Commission's Vice Chairman to the Chairman of the Senate Judiciary Subcommittee to Consider H.R. 2734, in which he states:

> It does *not appear that the provisions of H.R. 2734 are intended directly or indirectly to affect the above-quoted exemption from the Anti-Trust Laws provided in section 15 of the Shipping Act.* However, in view of the fact that the bill contains provisions specifically recognizing

of transactions which otherwise would run afoul of the antitrust laws. The whole purpose of this opinion is to determine whether this particular transaction—a sale of all ships and assets—was the *type transaction* to which *authority* has been *given* to the Commission to pass on. The logic of our analysis is not aided by reference to congressional action which *explicitly and only* recognized authority of the Commission previously granted—and no more.

The Commission's attempt to discover an affirmative grant of power by Congress in the context of the 1956 hearings on proposed legislation affecting corporate mergers is equally unpersuasive. The FMC points to the statement of the Chairman of the maritime regulatory agency to the Acting Chairman of the Senate Subcommittee on Antitrust and Monopoly to the effect that "merger agreements approved by the Board [now the Commission] under Section 15 . . ., and the resulting mergers are ex-

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an exemption in respect of transactions approved by specified agencies under statutory authority, the Commission believes that the section in question should be amended to exempt from section 7 of the Clayton Act, as proposed to be amended by the bill, the transactions approved pursuant to authority given by the Maritime Commission under statutory authority such as the aforesaid section 15 of the Shipping Act, 1916. This would avoid undesirable controversy which is likely to arise from any contention that the failure to include the Maritime Commission among the agencies specifically mentioned makes agreements approved by the Commission . . . subject to provisions of section 7 of the Clayton Act.

Reply Brief for Respondent, Federal Maritime Commission, Appendix, p. 2, quoting excerpt from Letter from the United States Maritime Commission Vice Chairman, dated 29 Sept. 1949, filed in National Archives under title "H.R. 2734 accompanying papers, Senate Committee on the Judiciary, 81st Cong." (emphasis added).

exempt from Section 7 [of the Clayton Act]."[34] The FMC then concludes that, since "no view to the contrary was expressed by any subcommittee or other Senate member at that time,"[35] Congress must have intended Section 15 to encompass mergers as well as agreements of a continuing nature. It would be illuminating in this regard to examine all of the statements from various administrative agencies which were filed with the subcommittee and left uncontradicted by the committee or by Congress. The volume of law inferentially approved by Congress in this manner would probably be enormous.

The third legislative action cited by the Commission is the 1962 investigation by the Antitrust Subcommittee of the House Committee on the Judiciary into the ocean freight industry. The Subcommittee's Report (the Celler Report) describes a merger of two shipping firms, American Export Lines and Isbrandtsen Co., Inc., and its subsidiary, Isbrandtsen Steamship Co., as "an agreement recently approved by the Maritime Commission"[36] and notes "the word 'agreement' in the [Shipping] act is defined broadly so as to encompass all 'understandings, conferences and other arrangements.'"[37] The Commission's effort to deduce that the Subcommittee thereby agreed with the Commission that the latter possesses the authority to approve "acquisition agreements," nowhere specifically mentioned in the Celler Report, and to exempt such agree-

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[34] *Hearings on Legislation Affecting Corporate Mergers Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. 527 (1956).

[35] Reply Brief, *supra*, note 32, at 12.

[36] Antitrust Subcommittee of the House Committee on the Judiciary, *Report on the Ocean Freight Industry*, 87th Cong., 2d Sess. 47 (1962).

[37] *Id.*, at 331.

ments from Section 7 of the Clayton Act, is no more convincing than its interpretation of the events (or non-events) of 1950 and 1956. In fact, the Celler Report, in summarizing its approach to Section 15, reveals one type of agreement which it had in mind:

> It is clear to the subcommittee that the language in Section 15 defining agreements that must be filed should not be modified in any respect. It appears that one of the Board's [now the Commission's] principal motives for requesting legislative "clarification" was to divest itself of statutory authority which could be invoked by an energetic agency at some future time to require filing and approval of *conference rate schedules.*[39]

All that the congressional action since 1916 cited to us by the Commission reveals is that the Commission has indulged in some wishful thinking in regard to its own jurisdiction over certain type contracts, which raise antitrust questions but which are not specifically included within Section 15, yet Congress has never acted to transform those daydreams into the concrete reality of statute.

IV. *Administrative and Judicial Construction of Section 15 of the Shipping Act of 1916*

A. *Action by the Commission.*

The Commission asserts that when confronted with transactions such as presented by the case at bar which "affect competition, whether by sale or merger," it has held that they are subject to the requirements of Section 15. However, investigation of the cases cited by the Commission in support of this assertion reveals that in each instance the transaction at issue was one of a continuing nature calling for the supervision of the Commission, not a single transaction such as a sale of ships with no re-

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[39] *Id.*, at 235 (footnote omitted) (emphasis added).

restrictions governing their subsequent use."* The Commission has not prior to this time asserted jurisdiction over a

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* The first case advanced by the FMC, *New York and Porto Rico S.S. Co.—Waterman S.S. Corp. Agreement* (3 U.S.M.C. 48 (1940)), involved a sale of good will by one common carrier by water to another, together with an agreement not to compete in the Gulf of Mexico-Puerto Rico service for a period of ten years. In view of the latter provision, the Commission found the transaction to be one which "controls, regulates, prevents, and destroys competition in the Puerto Rican trade" and that it was therefore subject to FMC jurisdiction under Section 15. The situation presented by the case at bar, however, involves simply a sale by Oceanic of its fleet of four vessels and its interest in two containerships, together with a transfer of related personnel and shoreside equipment, to Pacific Far East Line. Oceanic retains its corporate existence and is free to re-enter the North American Pacific Coast-Australasian or any other trade at any time.

The second case cited by the Commission is *Agreements 8745 and 8745–1, Purchase of Vessels "Alicia" and "Dorothy"* (7 F.M.C. 199 (1962)), which involved a sale of two vessels and an agreement on the part of the seller not to compete with the buyer in the Gulf of Mexico-Puerto Rico trade for a period of one year. As such, the Commission found the sale to be one which "regulates, prevents, and destroys competition" and therefore subject to the FMC's jurisdiction under Section 15. The Commission underscores the fact that in that case it requested and received the views of, *inter alia*, the Antitrust Division of the Department of Justice on the proposed sale, indicating that the Antitrust Division had no objection to FMC approval of the transaction. If the Commission believes that because there is a sale of vessels involved in the case at bar as well, that should suffice to give the FMC jurisdiction under Section 15, it fails to recognize the significant difference between the two cases: In *Agreement 8745 and 8745–1*, in addition to the sale of vessels, there was a covenant not to compete for one year, which clearly "controls, regulates, prevents, and destroys competition"; in the case at bar, however, there is a simple sale of ships, with no such continuing restrictions imposed upon or agreed to by Oceanic.

simple ship sale where the agreement does not limit competition between the parties, either by a merger or by a

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Agreement No. 8555 Between Isbrandtsen S.S. Co., Isbrandtsen Co., Inc., and American Export Lines, Inc. (7 F.M.C. 125 (1962)), the third case cited by the Commission, involved a sale by Isbrandtsen of its liner fleet of fourteen vessels and its entire business, including good will, to American Export, as well as agreeing not to compete in the service transferred without American Export's consent. There is no such agreement "controlling, regulating, preventing, or destroying competition" in the case at bar.

The fourth case advanced by the Commission is *Agreement for Consolidation or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.* (11 F.M.C. 53 (1967), *rev'd on other grounds, Matson Navigation Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968)), involving an agreement for the merger or consolidation of three lines, with at least American Mail remaining a separate division for steamship operations; or, in the alternative, merging American President Lines and Pacific Far East into a single entity, with American Mail remaining a subsidiary. This case may be distinguished from the case at bar in that the former involved a merger or consolidation, not simply a sale in which both the buyer and seller retain their separate corporate existence and in which the seller is free at any time to compete with the buyer. While the Commission in the former case stated that "section 15 provides for continuing [FMC] supervision where it is called for—but we do not concede that the provision for continuing supervision of agreements requiring it limits our authority to only those agreements" (11 F.M.C., at 60–61), the transaction in that case, a merger or consolidation, is fundamentally distinct from that presented by the case at bar. The Commission's finding in *Matson* that it had jurisdiction under Section 15, then, is not determinative of the issue in the case here, even assuming that the FMC correctly determined its jurisdiction in *Matson*. See *infra*, our discussion of the Ninth Circuit's decision.

Agreement 9905 Between Moore-McCormack Lines, Inc., and American Export Isbrandtsen Lines, Inc. (11 Pike & Fischer Ship Reg. Rep. 1000 (1970)), another case cited by

covenant not to compete.[40] The Commission's silence in this respect for over fifty years indicates that even in the view of the FMC, at least until the present, Section 15 does

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the Commission, involves a contract of sale of four container-ships, constructed with the aid of construction-differential subsidy, by Moore-McCormack to American Export. The parties submitted the agreement for United States Maritime Administration/Maritime Subsidy Board approval, not FMC approval under Section 15 (although the agreement does not itself preclude such review; it simply does not seek it). Approval by the former agencies was sought in view of the parties' intention to award an operating-differential subsidy to a wholly-owned subsidiary to be created by American Export.

The final case cited by the Commission is *Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc. and W. R. Grace & Co., and Transfer of Prudential Assets and Obligations to Grace Line, Inc.* (13 F.M.C. 156 (1969)), providing for the purchase by Prudential from W. R. Grace & Co. of all the outstanding capital stock of Grace Line, leaving the latter as the sole operating company. Despite the fact that Prudential and Grace Line served entirely different and unrelated trade routes prior to Commission approval of Agreement No. 9810, that case differs from the case at bar in that Prudential was eliminated altogether as an operating company *and* remained solely as a holding company, controlling all of Grace Line's outstanding capital stock. As such, in contrast to the situation presented by the case at bar, there is clearly no incentive for Prudential to re-enter its former or any other trade served by Grace Line, in view of its control of the latter. Oceanic, however, might well decide to acquire vessels and related personnel and shoreside equipment again to re-enter the North American Pacific Coast-Australasian or any other trade. FMC jurisdiction here was not challenged by judicial review.

Another FMC case, not cited by the Commission here, *Agreement No. 9827 Between United States Lines, Inc., and Sea-Land Service, Inc. (and Walter Kidde & Co., Inc., and R. J. Reynolds Tobacco Co., Guarantors)* (11 Pike & Fischer Shipping Reg. Rep. 759 (1970)), involved an agreement which

not provide for FMC jurisdiction over a sale of ships, absent either a provision limiting competition among the parties or a provision of some other type requiring continuing supervision.

The type of agreements which the FMC has approved is indicated by the following:

> Any agreement on which the Commission stamps it [sic] approbation is specifically exempted from the antitrust laws under the act. . . . As of the time of the subcommittee's hearings [1962], there were in effect and approved by the Board [now the Commission] under section 15 roughly 129 conference agreements of one sort or another and some 400 related agreements dealing with transshipment of cargo, providing for joint service and joint sailing relationships, the pooling of cargo, etc. There had also been approved by the Board approximately 15 interconference agreements (not including agreements providing merely for joint administration of two or more conferences), 29 terminal agreements; 100 agreements between freight forwarders; and a relatively small number of miscellaneous agreements.[41]

These are the type agreements which fall within the seven

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initially provided for a twenty-year lease by one common carrier by water of sixteen containerships and related equipment of another, with an option to purchase at the end of the lease period. It was subsequently modified to provide for the merger of the two carriers, and was submitted to the FMC for approval under Section 15. The Antitrust Division of the Department of Justice filed a complaint in the United States District Court for the District of New Jersey seeking to enjoin implementation of the merger agreement. The FMC sought to intervene and have the proceedings stayed and the complaint dismissed. The court ruled against the Commission, holding that the FMC does not have authority under Section 15 in regard to mergers in the shipping industry (*United States v. R. J. Reynolds Tobacco Co.*, *supra*, note 19).

[41] See note 34, *supra*, at 331.

categories of Section 15 and which we would expect to find as the grist for the FMC mill.

We recognise that there is a certain apparent inconsistency (more apparent than real) in holding that the parties are not required to file with the Commission and the Commission is not required to approve or disapprove a simple contract for the sale of ships and all assets, and yet a similar contract coupled with an agreement not to compete, which may involve more complicated antitrust issues than the more simple sale contract, is required to be filed and the Commission may have jurisdiction to pass on all questions, including antitrust issues. The explanation lies in (1) the wording of Section 15, (2) its legislative history, (3) the fact that the degree of antitrust complexity is not what determines the Commission's jurisdiction, and (4) perhaps in a caveat.

As for (1), the wording of Section 15, a simple sale of ships and assets, nothing more, is just not covered by any of the seven categories of "agreements" listed in Section 15. As for (2), the legislative history, the Alexander Report and all the background of the Shipping Act of 1916 show that a simple ship sale, even of all ships and assets, was not the type contract which was to be filed with and regulated by the Commission. The Alexander Report and the Congress prescribed two remedies for what ailed the shipping industry: compel the public filing of all noncompetitive agreements; and let a government agency approve or disapprove initially, then observe and supervise the continuing effect of the agreements. A ship sale is necessarily recorded to pass title and thus comes to public notice without being filed with the Commission; once the sale is made, there is a completely executed contract, over which there is no purpose in requiring Commission supervision. Thus it is not (3), the complexity of the antitrust issues involved, which determines if the FMC has juris-

diction. The FMC has or does not have jurisdiction depending on its statutory grant, and this was largely done by Congress on the basis of its recognition of industry needs and the helpfulness of government regulation. We have construed the FMC jurisdiction in relation to the antitrust laws, and done so above on the well-established principle that the normal administration of the antitrust laws should apply unless the statutory grant in derogation thereof is clear. Now for (4), the caveat: of the Commission's own decisions exercising authority to pass on antitrust questions after the "agreements" had been filed with the FMC, only two have ever been challenged in court.[42] And in these two instances, the courts reached opposite conclusions. To be accurate, then, administrative practice with respect to ship sales plus other continuing elements offers no support one way or the other.

B. *Court Decisions.*

There are two principal cases cited by the parties, one supporting the Commission's interpretation of Section 15,

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[42] The first is *Agreement for Consolidation or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc., supra*, note 39. While finding in that case that the FMC does have jurisdiction under Section 15 to approve mergers, the Ninth Circuit vacated the Commission's order approving the merger on other grounds—that the Commission must await final action by the parties, not simply agreement on their part to agree to merge or consolidate, before considering the arrangement. As discussed *infra*, however, we believe the Ninth Circuit's decision to be in error with respect to the reach of Section 15 over mergers, and agree basically with Judge Carter's dissent.

In the second, *Agreement No. 9827 Between United States Lines, Inc., and Sea-Land Service, Inc. (and Walter Kidde & Co., Inc., and R. J. Reynolds Tobacco Co., Guarantors), supra*, note 40, the court found the Commission without authority under Section 15 to approve shipping industry mergers, a conclusion with which we agree, *infra*.

the other the Department of Justice's view. The latter, *United States* v. *R. J. Reynolds Tobacco Company*,[43] involved the question of whether the FMC has authority to exempt shipping industry mergers from the antitrust laws. The court observed in regard to the legislative history accompanying Section 15:

> Consistently throughout the [Alexander] Report, mergers and other corporate reorganizations, when occasionally mentioned, are referred to by the terms "consolidation by ownership" and "control through acquisition," or variations thereof. Never is the word "agreement" used in the Report to refer to a merger agreement. It is clear that the Alexander Committee distinguished conceptually between agreements in the sense of on-going, cooperative agreements and agreements of "consolidation" or "acquisition" (of which merger agreements are a form). . . .
>
> It must be assumed that the Alexander Committee knew that acquisitions of water lines and ownership of accessories to such lines were the products of contracts or agreements, as that term is commonly understood. . . .
>
> [The court], therefore, reach[es] the unavoidable conclusion that "agreement" is a term of art, a word of technical legal significance, as used by the Alexander Committee and Congress in enacting Section 15 of the Shipping Act.[44]

The court thus concluded that mergers and other forms of corporate reorganization were beyond the protection from the antitrust laws afforded by Section 15.

This contrasts with the two-to-one decision of the Ninth Circuit in *Matson Navigation Co.* v. *FMC*,[45] relied upon by the Commission here. Matson involved the issue of FMC authority to approve an agreement for the proposed

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[43] 325 F. Supp. 656 (D.N.J. 1971), see note 19, *supra*.

[44] *Id.*, at 659.

[45] 405 F.2d 796 (9th Cir. 1968), see note 39, *supra*.

merger or consolidation of three steamship lines. The court found that mergers were included within the meaning of the term "agreement" as employed in Section 15 of the Shipping Act. However, the *Matson* court did not engage in the careful analysis of the legislative history which characterizes Judge Garth's opinion in *Reynolds Tobacco, supra*. Instead, it simply contented itself with saying, after quoting from the Supreme Court's decision in *Volkswagenwerk* v. *FMC*:[46]

> While *Volkswagenwerk* did not deal with a merger agreement, its holding applies to such agreements with rational force. The direct and destructive impact upon competition which may result from a merger renders it the kind of arrangement as to which expert scrutiny most clearly is to be desired.
>
> [The court] conclude[s] that the Commission has jurisdiction under § 15 to approve merger agreements.[47]

We respectfully disagree with the majority in the Ninth Circuit, find Judge Carter's dissent persuasive, and submit that reliance on *Volkswagenwerk, supra*, by the Commission here and in *Matson* is misplaced.[48] Despite the Court's statement in *Volkswagenwerk* that "[n]othing in the legislative history suggests that Congress, in enacting § 15 of

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[46] 390 U.S. 261 (1968).

[47] See note 45, *supra*, at 800.

[48] As Judge Carter observed, dissenting in part and concurring in part:

> *Volkswagenwerk* v. *FMC*, . . . as the majority correctly points out, did not deal with a merger. The case dealt with a "cooperative working agreement," one of a "myriad of restrictive agreements in the maritime industry" . . . and one clearly within the scope of the Alexander Report. The case cannot be read to go the whole route and authorize F.M.C. to approve mergers of great shipping corporations.

Id., at 808.

the Act, meant to do less than follow this recommendation of the Alexander Report [that all 'agreements' be filed for approval with the FMC] and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry,"[40] the reference to a "myriad of restrictive agreements" does *not* include agreements other than those of a continuing nature. The "myriad" includes such diverse agreements as pooling of earnings, losses, or traffic; fixing or regulating rates; allotting ports; and the like. Furthermore, the agreement at issue in *Volkswagenwerk* itself was a cooperative working arrangement of a continuing nature, entered into by an association of shipping industry employers subject to the Shipping Act, for the purpose of allocating among themselves a common assessment for a union trust fund.

The legislative history discussed above, illuminated by Judge Garth's analysis in *Reynolds Tobacco, supra*, makes clear that "agreements" as used by the Alexander Committee embraced the type involved in *Volkswagenwerk*, but did not include "mergers," "acquisitions," and like ilk, such as the sale of all assets in the case at bar.

V. *The Statute Applied to the Case at Bar*

We reach a different result here from that of the *Matson* court majority, one additional reason being the different consequences we envisage following from our interpretation of the statute. The Ninth Circuit decision was partly based on a fear that:

> . . . [T]o leave enforcement of antitrust policy in [merger and acquisition] cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements contrary to the intent of the Shipping

[40] See note 46, *supra*, at 276.

Act that industry considerations must be taken into balance in judging industry arrangements."[80]

We take a different view. If the Department of Justice or the Federal Trade Commission attacks a shipping industry merger or acquisition in the courts as contrary to the antitrust laws, the Maritime Commission should be free to intervene on behalf of the "industry viewpoint." The inadequacy of vesting the Maritime Commission with jurisdiction to weigh industry and antitrust considerations in merger or acquisition situations is evident from the case at bar, in which:

(1) No hearing was held, even though Section 15 itself recognizes that a hearing is appropriate in all cases other than those "of a purely routine nature," which "have an impact on commerce that the Commission finds is *de minimis*,"[81] and those of "a restrictive nature" where the "applicant for approval . . . [satisfies] the burden of demonstrating the need for anticompetitive restraints. . . ."[82] The sale of all Oceanic's assets to Pacific Far East,

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[80] See note 45, *supra*, at 800.

[81] See *Marina Space Enclosures* v. *FMC*, 137 U.S. App. D.C. 9, 16, 420 F.2d 577 (1969), citing *Volkswagenwerk* v. *FMC*, *supra*, note 46, at 276, where the Court stated:

> This is not to say that the Commission is without power to determine, after appropriate administrative proceedings, that some types or classes of agreements coming within the literal provisions of § 15 are of such a *de minimis* or routine character as not to require formal filing.

See also 46 U.S.C. § 883(a) (*as added* 6 Nov. 1966, Pub. L. 89-778, 80 Stat. 1358.

[82] See *id.*, 137 U.S. App. D.C. at 15, 420 F.2d at 583, citing *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 244 (1968), where the Court observed that "[b]y its very nature an illegal restraint of trade is in some ways 'contrary to the public interest.'"

however, can hardly be said without a hearing to have a *de minimis* impact on competition. On the other hand, with no hearing, it was hardly possible for the applicants to meet satisfactorily all the objections to "anticompetitive restraints" Seatrain might have raised.

(2) No record was developed by the Commission, detailing its weighing of the antitrust and industry considerations.

(3) There is no possible way this court could review the FMC's consideration here of, *inter alia*, the antitrust implications of Oceanic's sale of all its assets to Pacific Far East. The weighing of the importance of governmental action contrary to antitrust policy and the opportunity for judicial review were two of the "relevant criteria" we enumerated in *Hecht* v. *Pro-Football, Inc.*, *supra*, for determining "to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws . . . ."[33]

In contrast, full opportunity for a hearing, with participation of all interested parties, creation of a record, and full appellate court review, would be possible in an original action on this proposed sale in the U.S. District Court. Again, we intend no implication on the merits of any antitrust question which may be here involved, nor do we suggest that it is incumbent on any antitrust enforcement agency to challenge this sale contract. We do hold that it is not the Federal Maritime Commission which has the duty to approve or disapprove the type contract made the subject of this litigation.

In view of our finding that the Federal Maritime Commission lacks jurisdiction under Section 15 of the Shipping Act of 1916 to approve arrangements of the type involved here, which do not require the continued existence

[33] See text at footnote 11, *supra*.

or participation of the parties in such arrangements, it is unnecessary for us to consider the other issues presented by this appeal. The decisions of the Commission approving Agreement No. 9903 and denying a petition to reopen are accordingly vacated, with the Commission directed to remove this agreement from its docket.

So Ordered.

APPENDIX B

Federal Maritime Commission

ORDER

APPROVAL OF AGREEMENT NO. 9903 AND DENIAL OF REQUEST FOR HEARING AND INVESTIGATION

Agreement No. 9903, in the form of a contract of sale between the Oceanic Steamship Company (Oceanic) and Pacific Far East Line (PFEL), has been filed for approval under section 15 of the Shipping Act, 1916, as amended. This arrangement would permit PFEL to purchase all four of Oceanic's vessels presently engaged in the North American Pacific Coast-Australasian trades (T.R. 27); provide for PFEL's succession in Oceanic's interest to two C7-S-88a containerships now under construction, the underlying construction differential subsidy contracts (CDS) awarded Oceanic by the Maritime Administration (MARAD), and to Oceanic's operating differential subsidy rights and obligations on T.R. 27. The sale is contingent upon Oceanic and PFEL obtaining all requisite approvals from MARAD.

Agreement No. 9903 was protested by Seatrain Lines, Inc. (Seatrain), who requested a hearing in the matter and petitioned for permission to intervene in any resultant proceeding. In support of its motion, Seatrain maintains (1) that it is a common carrier in the Pacific Coast/Hawaii and Guam trades (domestic trades), "and is considering entry into the trades" encompassed by Trade Routes 27 and 29, the Pacific

Coast/Far East trades; (2) that PFEL "proposes to interchange the acquired ships with its current fleet operating on T.R. 29"; (3) that the acquired ships could be used by PFEL in direct competition with Seatrain which would be "severely prejudiced by the operation of CDS-built ships in these domestic trades"; and (4) that the "sale also negates the possibility of PFEL entering into T.R. 27 as a competitor of Oceanic or of Oceanic entering T.R. 29 as a competitor of PFEL * * *."

While section 15 of the Shipping Act, 1916, requires notice and opportunity for hearing, prior to agreement approval, there is no requirement of law that the mere filing of a protest is sufficient to require that a hearing be held before the Commission may grant approval of any protested agreement. As the Court of Appeals pointed out in *Marine Space Enclosures, Inc.* v. *FMC*, 420 F. 2d 577, 591–592 (D.C. Cir. 1969), there must be sufficient information brought to the attention of the Commission to activate the hearing requirements. Furthermore, the approval of an agreement has been upheld over protest and without hearing, where protests were without merit. See *City of Los Angeles* v. *FMC*, 388 F. 2d 582 (D.C. Cir. 1967).[1] Furthermore, the Commission cannot disapprove an agreement, even after notice and hearing, on the basis of speculation alone. See *Agreement No. T–4; Terminal Lease Agreement, Long Beach, California*, 8 F.M.C. 521, 534 (1965). Section 15 of the Shipping Act, 1916, requires a finding that an agreement operates or will operate in an unlawful fashion before it

[1] In *City of Los Angeles*, the Commission did schedule a hearing, but only with respect to certain factual questions and such hearing was held subsequent to the Commission's approval.

may be disapproved, and such findings must, of course, be supported by substantial evidence.

Seatrain not only fails to indicate by means other than mere speculation that any damage is likely to occur to it as a result of approval of Agreement 9903, but the likelihood of any impact at all upon its operations which might result from approval of the agreement is a matter of mere speculation. Seatrain does not indicate that it is in competition with either of the parties in the trades dealt with in the proposed agreement, but merely states that it is "considering entry into * * * [such] trades." Furthermore, insofar as the domestic trades are concerned, we note that operators of CDS ships are required to remit to MARAD a portion of the construction differential subsidy when a ship is used in the domestic service pursuant to section 506 of the Merchant Marine Act, 1936, and MARAD's General Order 50.

Accordingly, the Commission is compelled to conclude that Seatrain has no standing in this matter, and that its protest is without substance. Request for investigation and hearing are therefore denied.

There is nothing in the proposed agreement that would prevent Seatrain from entering the Far East trade should it decide to do so in the future. Nor is there anything in the agreement which would prevent PFEL and Oceanic from competing with each other anywhere at any future time.

Examination of Agreement No. 9903 in the light of known facts fails to show it to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States,

contrary to the public interest or violative of the Shipping Act, 1916.

Now therefore, by virtue of authority vested in the Commission, *It is ordered,* That Agreement No. 9903 be, and the same is hereby, approved under section 15 of the Shipping Act, 1916.

By the Commission. October 27, 1970.

[SEAL] FRANCIS C. HURNEY,
Secretary.

APPENDIX C

Federal Maritime Commission

Denial of Petition To Reopen

APPROVAL OF AGREEMENT NO. 9903

On October 27, 1970, we approved Agreement No. 9903 in the form of a contract of sale between Oceanic Steamship Company (Oceanic) and Pacific Far East Line (PFEL). The agreement was approved notwithstanding a protest and request for hearing by Seatrain Lines, Inc. (Seatrain), on the grounds that Seatrain had no standing to protest the agreement and that its protest was furthermore without substance. Seatrain has petitioned for a reconsideration of its protest and request for hearing, and Oceanic and PFEL have replied urging that reconsideration be denied. Seatrain Lines has also moved to strike the replies filed by PFEL and Oceanic, citing Rule 16(b) of our Rules of Practice and Procedure which prohibits replies to petitions for reconsideration. PFEL has replied to the motion urging that the replies be received.

The Commission may waive its rules where, *inter alia*, the expeditious conduct of business so requires. The views of PFEL and Oceanic will be of assistance to us in efficiently resolving this matter. Accordingly, we hereby waive the applicable portion of Rule 16(b), deny the motion to strike and receive the replies.

Nothing has been raised in Seatrain's petition for reopening which requires us to reconsider our approval of the subject agreement. Seatrain's contention that the Commission should not have approved the subject agreement because the parties thereto failed to meet their burden of proof is without merit. The ship sale is not, as Seatrain contends, "on its face, a transaction that would violate section 7 of the Clayton Act". That statute makes unlawful acquisitions which "substantially lessen competition, or * * * tend to create a monopoly" (46 U.S.C. § 18), determinations which cannot be made from the face of the agreement. As we observed in our Report in Docket No. 70-42 – *Agreement No. 9905*, served November 23, 1970, the "burden of proof with respect to approval of a section 15 agreement ultimately rests with the Commission." In other words, as the Supreme Court declared in *F.M.C.* v. *Svenska Amerika Linien*, 390 U.S. 238, 245 (1968), before the Commission can disapprove an agreement it "must of course adduce substantial evidence to support a finding under one of the four standards of section 15 * * *" This does not mean that proponents of an agreement have no obligations with respect to furnishing information which may be required to justify an agreement. Here, however, the nature of the agreement as indicated by its language does not indicate a need for further justification, and nothing has been raised by Seatrain which indicates that it is required. As was noted in the order of approval, "There is nothing in the proposed agreement that would prevent Seatrain from entering the Far East trade should it decide to do so in the future. Nor is there anything in the agreement which would prevent PFEL and Oceanic from competing with each other anywhere at any time."

Finally, contrary to Seatrain's assertions, there is nothing in *Marine Space Enclosures, Inc.* v. *F.M.C.*, 420 F. 2d 577 (D.C. Cir. 1969), or elsewhere, which indicates that Seatrain has shown the requisite standing to demand a hearing with respect to the approval of Agreement 9903. The Court's finding of standing in *Marine Space Enclosures* was based on its conclusion that the agreement, if approved, might pose an undue restraint on future competition, since it effectively foreclosed such competition for a period of 70 years. Here, as we noted in the order of approval, Seatrain has not indicated any likelihood of damage as a result of approval of the agreement, and has even failed to indicate a likelihood that it will compete with Oceanic and PFEL in the trades affected by the agreement.

Therefore, *It is ordered*, That the petition of Seatrain Lines, Inc., for reopening of the matter of our approval of Agreement No. 9903 be, and it hereby is, denied.

By the Commission.

[SEAL] FRANCIS C. HURNEY,
Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1647

FEDERAL MARITIME COMMISSION, *Petitioner*

v.

SEATRAIN LINES, INC., *et al.*, *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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MEMORANDUM FOR SEATRAIN LINES, INC. IN OPPOSITION

Petitioner seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Seatrain Lines, Inc.* v. *Federal Maritime Commission*,[1] in which the court unanimously determined as a matter of law that the Federal Maritime Commission ("FMC") was without jurisdiction to approve an agreement of merger of two common carriers by water and to extend to the agreement of merger an antitrust exemption. There is no dispute as to the facts of the merger or that the merger would

[1] The opinion is not yet officially reported and is fully set forth in Appendix A of the Petition.

be subject to Section 7 of the Clayton Act. The basic issue is whether the FMC has jurisdiction under Section 15 of the Shipping Act, 1916 (46 U.S.C. 814) to approve the merger and by so doing grant antitrust immunity. The United States Court of Appeals for the District of Columbia Circuit in a detailed analysis of the legislative history and Congressional intent behind the Shipping Act, 1916, as amended, correctly concluded that the FMC was without jurisdiction over Clayton Act mergers and could not exempt such mergers from the Clayton Act.

1. The D. C. Circuit decision is not in conflict with the Ninth Circuit decision in *Matson Navigation Co. v. F.M.C.*, 405 F.2d 796 (9th Cir. 1968). As Judge Wilkey noted in *Seatrain*, the *Matson* case involved the merger and consolidation of three lines and was not a sale of assets in which the buyers and sellers retained separate corporate existence and in which the seller remained free to compete in the future. Further, the *Matson* court recognized that the agreement before them was not a merger agreement:

> "While the Commission order purported to be a final approval of the merger, *the agreement to which the order was directed was not in proper sense a merger agreement.* The parties simply agreed to agree." 405 F.2d at 800. (Emphasis added.)

If, as the Ninth Circuit recognized, the agreement was not a merger agreement, then the court's discussion and decision that the FMC had jurisdiction over mergers should be considered to be dicta. As dicta, it clearly does not have the status of a decision in conflict with the District of Columbia Circuit opinion in *Seatrain*. Thus, contrary to the arguments of the FMC, there is no conflict between Circuits.

2. Even if a conflict between Circuits exists, a comparison of the Ninth Circuit and D. C. Circuit opinions demonstrates that the Ninth Circuit majority did not fully analyze the jurisdiction issue and merely concluded that the FMC had jurisdiction. In comparison, the District of Columbia Circuit undertook an in-depth analysis of the legislative history of the Shipping Act, 1916, as amended, and Congressional intent and then concluded that the FMC was without jurisdiction. Moreover, the unanimous panel of the D. C. Circuit was in full agreement with Judge Garth's views in *United States* v. *R. J. Reynolds Tobacco Co.*, 365 F. Supp. 656 (D. N.J. 1971), another case involving the FMC's merger jurisdiction in which the jurisdiction issue was resolved after a full analysis of the legislative history and intent of the Shipping Act, 1916.[2] Of the seven judges[3] deciding the issue of the jurisdiction of the FMC over mergers, five have concluded that the Commission lacked such jurisdiction.

3. Finally, it would appear that the subject matter of this action does not need resolution by this Court in view of the existence of a legislative remedy. In recent years the FMC has urged several amendments to the Shipping Act in order to clarify or broaden its jurisdiction. Surely, the Congress is the one to decide whether it wants the Federal Maritime Commission to

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[2] A petition for writ of certiorari to review Judge Garth's opinion is now pending before this Court in *R. J. Reynolds Tobacco Company, et al.* v. *United States and Federal Maritime Commission*, No. 71-157.

[3] The seven judges include the appellate panel in *Matson, supra*, which divided 2-1 in favor of jurisdiction; Judge Garth of the District Court in New Jersey who concluded that the FMC was without merger jurisdiction; and the appellate panel in *Seatrain* v. *F.M.C.* which unanimously agreed that the FMC was without merger jurisdiction.

have jurisdiction over Clayton Act mergers and whether it gives FMC the right to exempt such mergers from the antitrust laws. As long as there is a legislative remedy and the matter does not involve Constitutional issues, we suggest that there is no strong requirement for the Court to grant the petition.

4. Seatrain notes that its appeal to the District of Columbia Circuit was based upon the denial of a statutory hearing to Seatrain by the FMC. If certiorari were granted, and if the Court were to reverse the D.C. Circuit on the jurisdiction issue, the issue as to Seatrain's right to a statutory hearing would remain. Seatrain believes the right to a hearing issue if reached must be resolved in its favor.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for:
SEATRAIN LINES, INC.

July 20, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SEATRAIN LINES, INC., PACIFIC FAR EAST LINES, INC. AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The United States believes that the court of appeals correctly held that the Federal Maritime Commission does not have power to approve the acquisition of assets of one carrier by another under Section 15 of the Shipping Act. The issue, however, is obviously important in the administration of the antitrust laws and of the Shipping Act, and the court below expressly recognized its decision to be in con-

flict with that of the Ninth Circuit in *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F. 2d 796 (Pet. App. A, 45-47).

The United States has previously urged the Court to grant the petition of R. J. Reynolds Tobacco Co. for a common law writ of certiorari in *R. J. Reynolds Tobacco Co.* v. *United States and Federal Maritime Commission*, No. 71-157, in order to determine the related question of the Commission's power to approve mergers between carriers under Section 15 of the Shipping Act.[1] In these circumstances the United States does not oppose the granting of a writ of certiorari in this case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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[1] As stated in the Supplemental Memorandum for the United States filed contemporaneously herewith in No. 71-157, the United States is of the opinion that it would be appropriate to defer consideration of the petition in that proceeding until the instant case is determined.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SEATRAIN LINES, INC., PACIFIC FAR EAST LINES, INC., and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR R. J. REYNOLDS TOBACCO COMPANY AS *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

R. J. Reynolds Tobacco Company hereby respectfully moves pursuant to Supreme Court Rule 42(3) for leave to file the annexed brief as *amicus curiae*. Counsel for petitioner Federal Maritime Commission and counsel for respondents United States of America and Pacific Far East Lines, Inc. have consented to the filing of this brief. The consent of counsel for respondent Seatrain Lines, Inc. was requested but refused.

The Court of Appeals held in the present case that the FMC is without jurisdiction under Section 15 of the Ship-

ping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, over a totally concluded acquisition by one common carrier by water of the assets of another. The Court of Appeals distinguished the question whether the FMC would have jurisdiction over an acquisition which is subject to the continuing supervision, modification, and approval of the FMC under Section 15.

R. J. Reynolds Tobacco Company is a party to such a defeasible ongoing acquisition under which Reynolds, which already owns one common carrier by water, Sea-Land Service, Inc., would acquire a second common carrier by water, United States Lines, Inc., to be operated by Reynolds as a continuing entity distinct from Sea-Land with their relationship subject to the ongoing supervision of the FMC. After extensive hearings the FMC has announced its intention to approve this agreement, but its jurisdiction to do so is the subject of a pending petition for a writ of certiorari, *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157.

R. J. Reynolds Tobacco Company submits the annexed brief as *amicus curiae* to demonstrate (1) that this Court in the present case need not decide the question of the FMC's jurisdiction over ongoing conditional acquisitions, because the holding under review was expressly limited to a totally concluded acquisition, and (2) alternatively, that the FMC has jurisdiction over ongoing conditional acquisitions. There is reason to believe that these considerations will not be adequately presented by the parties because no party has an interest in establishing the distinction between a totally concluded asset acquisition and one which con-

tinues the existence of the acquired company under the protection of FMC supervision and other ongoing conditions. Accordingly, R. J. Reynolds Tobacco Company respectfully requests leave to file the annexed brief as *amicus curiae*.

Dated: New York, New York
January 25, 1973

/s/ LAWRENCE E. WALSH
LAWRENCE E. WALSH
Attorney for Amicus Curiae

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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SEATRAIN LINES, INC., PACIFIC FAR EAST LINES, INC., and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR R. J. REYNOLDS TOBACCO COMPANY AS *AMICUS CURIAE*

In the decision under review, the United States Court of Appeals for the District of Columbia Circuit held that Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, denies the Federal Maritime Commission jurisdiction over a totally concluded acquisition of the assets of one common carrier by water by another. The Court of Appeals made clear that its holding did not encompass acquisitions which create an ongoing relationship subject to continuing supervision and modification by the FMC. R. J. Reynolds Tobacco Company is a party to such an ongoing conditional acquisition under which Reynolds, which already owns one common carrier by

water, Sea-Land Service, Inc., would acquire a second common carrier by water, United States Lines, Inc., to be operated by Reynolds as a continuing entity distinct from Sea-Land with their relationship subject to the ongoing supervision of the FMC. After extensive hearings the FMC has announced its intention to approve this agreement, but its jurisdiction to do so is the subject of a pending petition for a writ of certiorari, *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157.

Although the holding of the Court of Appeals in the decision now under review was limited to bare assets acquisitions between noncompeting carriers with no continuing elements, the FMC's petition for certiorari may be construed as raising the much broader question whether *any* acquisition, ongoing or not, is within the jurisdiction of the FMC under Section 15. R. J. Reynolds Tobacco Company submits this brief as *amicus curiae* to demonstrate that (1) this Court in the present case need not pass on the question of the FMC's jurisdiction over ongoing conditional acquisitions, because the holding of the Court of Appeals was expressly limited to bare assets acquisitions, and (2) if the Court reaches the question of the FMC's jurisdiction over ongoing conditional acquisitions, the Court should hold such acquisitions to be within the FMC's jurisdiction.

Question Presented

The question in *Seatrain* is whether the Federal Maritime Commission has jurisdiction under Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, over a concluded acquisition by one common carrier by water of the assets of another.

The Court of Appeals expressly avoided the question whether the FMC would have jurisdiction over the acquisition of a competing carrier where that acquisition gives rise to an ongoing relationship requiring the continuing supervision of the FMC under Section 15 and the continuing separate existence and operation of the acquired carrier. We submit that this Court need not reach this question in the present case, because this question is squarely presented by the pending petition in *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157. If the question is reached, it should be answered in the affirmative.

Statute Involved

Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, is set forth in full in the Appendix hereto (11a-13a), and reads in pertinent part as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part,
>
> [1] fixing or regulating transportation rates or fares;
>
> [2] giving or receiving special rates, accommodations, or other special privileges or advantages;
>
> [3] controlling, regulating, preventing, or destroying competition;

[4] pooling or apportioning earnings, losses, or traffic;

[5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

[6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;

[7] or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and

equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

. . . ."

Interest of *Amicus Curiae*

Sea-Land, a subsidiary of Reynolds, and U.S. Lines are major common carriers by water competing in United States foreign and domestic commerce. On November 9, 1970 Reynolds entered into an Agreement with Walter Kidde & Company, Inc., the owner of U.S. Lines, under which U.S. Lines would become a wholly owned subsidiary of Reynolds.* The Agreement, by its terms, was not to become effective until it had been approved by both the Federal Maritime Commission and the Interstate Commerce Commission, and it was immediately filed with both Commissions for approval.

On December 16, 1970 the FMC ordered a hearing on the proposed acquisition, Dkt. No. 70-51, which became the longest hearing ever held by the FMC. Ten groups of parties were separately represented, in addition to the

---

* This Agreement was preceded by a Charter Agreement dated October 27, 1969 under which Sea-Land would have chartered U.S. Lines' sixteen containerships and leased supporting container equipment for twenty years, with an option to purchase at the end of that period. The FMC held a hearing on the Charter Agreement, Dkt. No. 69-56, and the hearing examiner rendered an initial decision on July 28, 1970 holding that the FMC had jurisdiction of the Charter Agreement and that it should be approved. At this point, because of Kidde's need to be relieved without delay of the financial burden of U.S. Lines, it became necessary to enter into the Agreement.

Department of Justice and the FMC.* All issues, including jurisdiction and the impact upon competition of the proposed common ownership of Sea-Land and U.S. Lines by Reynolds, were thoroughly explored. On October 21, 1971 the hearing examiner filed an initial decision holding that the proposed acquisition was subject to the FMC's jurisdiction but recommending that it be disapproved upon competitive grounds.

After two days of oral argument before the full Commission, the FMC held in a preliminary opinion and order served June 7, 1972 (Appendix, 1a-7a) that it had jurisdiction over the proposed acquisition of U.S. Lines and that it was prepared to approve the acquisition upon detailed conditions requiring the independent operation of U.S. Lines and Sea-Land and providing for continuing FMC supervision of their relationship (1a-3a). Balancing competitive considerations against the national interest in meeting foreign containership competition and the public interest in improved ocean transportation, the FMC approved the acquisition in the interest of "stronger U.S.-flag competition in international maritime markets" (2a). The FMC stressed that it intends Sea-Land and U.S. Lines to be "two independent companies to be operated under a continuing Sec. 15 agreement", and retained jurisdiction to modify or cancel its approval at any time (2a, 6a).

After obtaining comments from all parties, the FMC issued news releases on September 28 and 29, 1972 (Appendix, 8a-10a) announcing that it had approved the pro-

* The Department of Justice, FMC Hearing Counsel, and three groups of competitors of Sea-Land and U.S. Lines opposed the Agreement. The Maritime Administration and the Department of Transportation also took part in the proceeding.

posed acquisition subject to issuance of its final opinion and order. The FMC's final opinion and order giving the detailed grounds for its approval is expected to be issued shortly.

On December 15, 1970, while the petition for approval of the Agreement was pending before the FMC, the United States commenced a civil antitrust action in the United States District Court for the District of New Jersey to enjoin the proposed acquisition of U.S. Lines by Reynolds. On April 7, 1971 the District Court held that the FMC lacked jurisdiction under Section 15 of the Shipping Act over the acquisition in the form then proposed. *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971). Reynolds and the other parties to the Agreement filed a petition for an extraordinary writ of certiorari to review the District Court's decision, on the ground that the FMC has jurisdiction over the Agreement and on the further ground that the FMC has primary jurisdiction to pass on its own jurisdiction. *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157. This petition is still pending.

Thus the interest of Reynolds in the issue of the FMC's jurisdiction over acquisition agreements which create an ongoing relationship between common carriers by water is direct and vital, because the proposed acquisition of U.S. Lines by Reynolds, which already owns Sea-Land, would create just such an ongoing relationship. The issue is likewise one of great public importance in light of the FMC's finding that the acquisition of U.S. Lines by Reynolds is necessary to maintain the U.S.-flag position in ocean shipping (1a-2a).

Statement

The Reynolds-U.S. Lines transaction differs fundamentally from that in the present case as described in the opinion of the Court of Appeals (460 F.2d 932). The present case involves the sale of all of the assets of Oceanic Steamship Company to Pacific Far East Lines, Inc.; although Oceanic retains its corporate existence, it does so only as a corporate shell (460 F.2d at 933). There had been no competition between Oceanic and PFEL. There is to be absolutely no continuing restriction or relationship of any kind between Oceanic and PFEL, and the FMC imposed no ongoing conditions on the transaction (460 F.2d at 933). Thus the Oceanic-PFEL transaction involved in the present case, unlike the Reynolds-U.S. Lines transaction, was fully concluded when the sale was closed, and involved no continuing elements subject to ongoing FMC supervision. The Court of Appeals stressed this fact again and again (460 F.2d at 935, 940-41, 945-46).

In the Reynolds-U.S. Lines transaction, both Sea-Land and U.S. Lines will continue to operate independently of each other although both will be subsidiaries of Reynolds (2a). Sea-Land and U.S. Lines will continue in competition under the ongoing supervision of the FMC, coupled with conditions imposed by the FMC to insure their independence (4a-6a). In addition to its power under Section 15 to cancel or modify the Agreement, the FMC has expressly stated that it will retain full jurisdiction to cancel or modify the terms and conditions of its approval of the Reynolds-U.S. Lines transaction (6a).

The extremely lengthy hearing held by the FMC in the Reynolds-U.S. Lines proceeding, and its weighing of anti-

trust considerations against the public interest in the most effective possible utilization of U.S. Lines' containerships, also makes inapplicable the conclusion of the Court of Appeals that the FMC cannot be trusted to balance anti-trust and public interest considerations because it held no hearing in the present case (460 F.2d at 948).

Summary of Argument

Acquisitions which create an ongoing relationship between common carriers by water, either by a cooperative working relationship and common ownership as in the Reynolds-U.S. Lines transaction or by a continuing covenant not to compete or other ongoing obligations, are within the jurisdiction of the Federal Maritime Commission under Section 15 of the Shipping Act.

1. Ongoing conditional acquisition agreements are brought within the FMC's jurisdiction by the plain terms of Section 15 of the Shipping Act. Such acquisition agreements are agreements "controlling, regulating, preventing, or destroying competition" within clause [3] of Section 15. They are also agreements "providing for an exclusive, preferential, or cooperative working arrangement" within clause [7].

2. The FMC has consistently held that it has Section 15 jurisdiction over ongoing conditional acquisition agreements, and Congress has amended and reenacted Section 15 with full knowledge of the FMC's position. This position was supported by the decision of the Ninth Circuit in *Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968). There is no judicial decision expressing doubt as to the

jurisdiction of the FMC except the decision under review and the decision in *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971), as to which a petition for certiorari is pending. The decision under review expressly distinguishes ongoing conditional acquisitions. The decision in *Reynolds* assumed that there were no ongoing elements, ignoring the power of the FMC to modify the Agreement and impose ongoing conditions.

3. The legislative history of the Shipping Act of 1916 shows that Congress was concerned with the common ownership of competing common carriers by water through acquisition, and confirms that it intended to subject acquisitions leading to such common ownership to the FMC's regulatory jurisdiction.

4. The Shipping Act was designed to place ocean shipping under the expert regulatory jurisdiction of a specialized administrative body. This policy obviously supports the FMC's jurisdiction over ongoing conditional acquisitions. The FMC is peculiarly well fitted to deal with such acquisitions because of its expertness and because of its continuing powers of supervision and modification of approved agreements under Section 15.

ARGUMENT

Section 15 of the Shipping Act of 1916 Confers on the Federal Maritime Commission Jurisdiction Over Acquisitions Which Create an Ongoing Relationship Between Common Carriers by Water.

1. The Plain Meaning of the Language of Section 15 Embraces Ongoing Conditional Acquisitions.

Section 15 of the Shipping Act, by its plain terms, clearly embraces at least those acquisitions which create an ongoing relationship between common carriers by water, either by a cooperative working relationship and common ownership as in the Reynolds-U.S. Lines transaction, or by a continuing covenant not to compete or other ongoing obligations. Such an agreement between competitors is an agreement "controlling, regulating, preventing, or destroying competition" which is covered by clause [3] of Section 15. Both the FMC and the Ninth Circuit have found this plain. *See Matson Nav. Co.* v. *FMC*, 405 F.2d 796, 799-800 (9th Cir. 1968); *Agreement No. 8555 Between Isbrandtsen S.S. Co. Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc.*, 7 F.M.C. 125, 128 & n.5 (1962). Even the Court of Appeals in the present case conceded that any asset acquisition "may at first impression be thought to fall within the third category" (460 F.2d at 934).

The Court of Appeals held, however, that asset acquisitions which do not create an ongoing operating relationship are not within Section 15 because it viewed the first six clauses of Section 15, including clause [3], as limited by clause [7], which deals with agreements "in any manner providing for an exclusive, preferential, or cooperative working arrangement" (460 F.2d at 934-35). We believe that this holding was erroneous, because it would reduce the first six clauses of Section 15 to mere surplusage, and be-

cause it disregards this Court's express holding that Section 15 "uses expansive language" and should be construed broadly so as to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." *Volkswagenwerk A.G.* v. *FMC*, 390 U.S. 261, 273-76 (1968).* Nevertheless, even if the Court of Appeals were correct in holding that clause [7] limits the other six clauses of Section 15, an ongoing conditional acquisition agreement like the Reynolds-U.S. Lines transaction, establishing a relationship between two common carriers by water, would still be within Section 15 because it is also "an exclusive, preferential, or cooperative working arrangement" covered by clause [7]. The Court of Appeals in the present case appeared to recognize this (460 F.2d at 935, 945-46).**

2. The FMC and the Courts Have Held Without Exception That Ongoing Conditional Acquisitions Are Within Section 15.

As the Court of Appeals recognized in its extensive discussion of earlier decisions (460 F.2d at 943-45), the FMC and its predecessors have consistently held that they have jurisdiction under Section 15 to approve or disapprove

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* Indeed, in *Volkswagenwerk* this Court rejected the FMC's contention that Section 15 covers only horizontal agreements among direct competitors for an exactly analogous reason: this restrictive interpretation would have limited Section 15 to the agreements covered by clause [3], and would have made all six of the remaining clauses superfluous. 390 U.S. at 275 & n.23.

** The Department of Justice, in its brief to the Court of Appeals, described as follows the "cooperative working arrangements" which it concedes are within the FMC's jurisdiction under Section 15: "They are [(1)] terminable, [(2)] susceptible of modification in the case of changed conditions, and [(3)] do not eliminate all competition between the parties." (P. 8.) All three of these statements are true of ongoing conditional acquisitions. In particular, all three are true of the Reynolds-U.S. Lines transaction.

acquisitions which create an ongoing relationship between common carriers. *See, e.g., Agreement No. 9810, Stock Purchase Agreement Between Prudential Lines, Inc. and W. R. Grace & Co.*, 13 F.M.C. 156 (1969) (purchase by one ocean carrier of stock of another); *Agreement for Consolidation or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 F.M.C. 53 (1967) (3-2), *rev'd on other grounds sub nom. Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968) (2-1) (merger of ocean carriers with continuing separate division or subsidiary); *Agreements 8745 and 8745-1, Purchase of Vessels "Alicia" and "Dorothy"*, 7 F.M.C. 199 (1962) (purchase of ships with covenant not to compete); *Agreement No. 8555 Between Isbrandtsen S.S. Co., Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc.*, 7 F.M.C. 125 (1962) (purchase of all the ships of an ocean carrier with covenant not to compete); *Agreements 788, 796, 798, Associated-Banning Co.* v. *Matson Nav. Co.*, 5 F.M.B. 336 (1957) (formation of joint venture); *New York and Porto Rico S.S. Co.-Waterman S.S. Corp. Agreement*, 2 U.S.M.C. 453 (1940) (purchase of "good will" with covenant not to compete).

The FMC's position that it has such jurisdiction has been consistently and clearly communicated to Congress since as early as 1949.* Congress, although it amended and re-

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* *See, e.g., Agreement for Consolidation or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 F.M.C. 53, 64 n.10 (1967), *rev'd on other grounds sub nom. Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968) (setting forth 1949 FMC letter to Congress); Hearings on S. 3341 Before the Antitrust Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. 546-47 (1956); Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on the Progress Report of the Federal Maritime Commission, 87th Cong., 2d Sess. 19-23 (1962).

enacted Section 15 in 1961 and 1964, 75 Stat. 763 (1961), 78 Stat. 148 (1964), has not attempted to alter the FMC's unbroken holding that Section 15 gives it jurisdiction over acquisitions in ocean shipping. The 1961 amendment was in large part an outgrowth of the comprehensive Celler Report on the ocean freight industry,* which expressly noted that the FMB had passed on the American Export-Isbrandtsen acquisition under Section 15. Report of the Antitrust Subcommittee of the House Judiciary Committee on the Ocean Freight Industry, 87th Cong., 2d Sess. 47-48 (1962). Similarly, the 1964 amendment affirmatively shows a congressional understanding that Section 15 covers long-term facilities agreements closely analogous to ongoing conditional acquisitions.**

The Ninth Circuit upheld the FMC's jurisdiction over an ongoing merger transaction in *Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968). No court has held the FMC to be without jurisdiction over an ongoing conditional acquisition. The Court of Appeals in the present case, although it held that the FMC lacked jurisdiction over a bare assets acquisition, indicated that it believed that the FMC has jurisdiction over acquisitions which create an ongoing relationship by saying:

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* S. Rep. No. 860, 87th Cong., 1st Sess. 10 (1961).

** The FMC in a number of decisions has exercised jurisdiction over agreements pursuant to which terminals and other port facilities are constructed in reliance upon the long-term commitment of a carrier to use them. *See, e.g., Agreement No. T-4: Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521 (1965). This Court cited these decisions with approval in *Volkswagenwerk A.G.* v. *FMC*, 390 U.S. 261, 274 (1968). The 1964 amendment to Section 15, 78 Stat. 148 (1964), whose purpose was to avert retrospective penalties based on these decisions, *see* H.R. Rep. No. 1126, 88th Cong., 2d Sess. (1964), reflects congressional acceptance of the decisions themselves.

> "We recognize that there is a certain apparent inconsistency (more apparent than real) in holding that the parties are not required to file with the Commission and the Commission is not required to approve or disapprove a simple contract for the sale of ships and all assets, and yet a similar contract coupled with an agreement not to compete, which may involve more complicated antitrust issues than the more simple sale contract, is required to be filed and the Commission may have jurisdiction to pass on all questions, including antitrust issues." 460 F.2d at 945.

In the *Reynolds* case the District Court held the FMC to be without jurisdiction over the Reynolds-U.S. Lines transaction, but it did so in the mistaken belief that the Reynolds-U.S. Lines transaction would *not* be an ongoing conditional acquisition.* The District Court held that Section 15 is limited to "cooperative working arrangements" and does not reach "an agreement of merger, which is essentially a single, discrete event". *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656, 659 (D.N.J. 1971).

Thus the FMC and the courts have consistently recognized the FMC's jurisdiction over ongoing conditional acquisitions, and Congress has reenacted Section 15 after specific notice of this exercise of jurisdiction. This well-established course of administrative construction of Section 15 is entitled to substantial deference from the courts. *E.g.*,

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* Defendants and the FMC pointed out to the District Court in *Reynolds* on rehearing that the FMC could modify the Reynolds-U.S. Lines transaction so as to make it undeniably an ongoing working arrangement, but the District Court adhered to its view that the FMC was without jurisdiction.

Volkswagenwerk A.G. v. *FMC*, 390 U.S. 261, 272 (1968); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944).

3. The Legislative History of the Shipping Act Confirms that Congress Intended to Give the FMC Jurisdiction Over Common Control of Competing Carriers.

The Shipping Act of 1916 stemmed in large part from the Alexander Report of 1914, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).* The Alexander Report makes clear that the Alexander Committee viewed common ownership of competing common carriers by water through acquisition as a principal public policy problem, especially in the domestic (intercoastal and Great Lakes) trade (Alexander Report, pp. 409-10). It described scores of examples of such common control (pp. 317-46, 369-89).** Given this deep concern with acquisitions, at least in the domestic

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* The legislative history of the enactment of Section 15 of the Shipping Act in 1916, as well as its subsequent reenactment in 1961 and other congressional action taken with notice of the FMC's assertion of jurisdiction over ongoing conditional acquisitions, is described and quoted in full in a printed Legislative History of Section 15 of the Shipping Act of 1916, dated March 1972 and prepared by Ragan & Mason. Because of its length (96 pages), copies of this Legislative History are being separately served and filed with the Clerk of the Court.

** The Alexander Committee also expressed concern over the possibility of unrestricted rate wars leading to wholesale consolidation of carriers in the foreign trade (Alexander Report, pp. 301, 416). As the FMC stated in the decision which the Ninth Circuit affirmed on the jurisdictional issue in *Matson*,

> "it is clear that the Committee and Congress recognized that it could not legislatively control totally foreign mergers any more than it could effectively legislate against rate wars. And it would seem to us, that the same considerations which led Congress to grant this Commission the power to exempt anti-competitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge." 11 F.M.C. at 58.

trade, it is inconceivable that Congress would have neglected to subject such acquisitions to regulation without expressly saying so in its report or in the debates which followed.* The erroneous statements of the court below (460 F.2d at 939) and the District Court in *Reynolds* (325 F. Supp at 659) that the Alexander Report was not concerned with acquisitions were apparently due to the failure to read Part II of the Report, dealing with the domestic trade. When it was passed in 1916, Section 15 applied to both the domestic and the foreign trade. *See* 39 Stat. 728, 733 (1916). Only in 1940 was domestic shipping transferred to the ICC by the Transportation Act of 1940 (the Wheeler-Lea Act). Thus the substantive thrust of the Alexander Report strongly supports the conclusion that, at the time of the enactment of Section 15, acquisitions of control of competing carriers were intended to fall within the FMC's jurisdiction under Section 15.

This conclusion is reinforced by the subsequent legislative history of the Transportation Act of 1940. Under that Act, the jurisdiction over domestic common carriers by water which had been given to the FMC by the Shipping Act was transferred to the ICC, and domestic carriers were made subject to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), which explicitly confers upon the ICC jurisdiction over mergers and consolidations. 54 Stat. 905 (1940), as amended, 49 U.S.C. § 5(13). It is inconceivable that such a change of substance, if this were a change, would not be discussed in the legislative history. Yet

* Congress could hardly have believed that the antitrust laws would render such regulation unnecessary. Indeed, in the one Sherman Act action brought against a domestic water carrier consolidation, which the Alexander Report mentioned with approval (pp. 340-41), a decree of dissolution was *denied* in 1914. *United States* v. *Great Lakes Towing Co.*, 217 F. 656 (N.D. Ohio 1914).

nothing in the voluminous Congressional debates and reports accompanying the passage of the Transportation Act of 1940 suggests that Congress thought that it was conferring upon the ICC a jurisdiction over mergers and consolidations which the FMC had not possessed, or that it was for the first time exempting such agreements from the antitrust laws. *See, e.g.*, S. Rep. No. 433, 76th Cong., 1st Sess. 28-32 (1939); H.R. Rep. No. 1217, 76th Cong., 1st Sess. 12 (1939).

4. The Structure and Aims of the Shipping Act Confirm the FMC's Jurisdiction Over Ongoing Conditional Acquisitions.

Fundamental public policy considerations reinforce the plain meaning of Section 15 in demonstrating the FMC's jurisdiction over acquisitions of ongoing entities. This Court has repeatedly stressed that the basic aim of the Shipping Act of 1916 was to place ocean shipping under the regulatory jurisdiction of an expert administrative body. *E.g., Far East Conf.* v. *United States*, 342 U.S. 570, 573-76 (1952); *United States Nav. Co., Inc.* v. *Cunard S.S. Co., Ltd.*, 284 U.S. 474, 485 (1932). Nowhere is such expertise more vital than in weighing the public interest implications of mergers and acquisitions. As Judge Merrill wrote in *Matson Nav. Co.* v. *FMC*, 405 F.2d 796, 800 (9th Cir. 1968),

> "The direct and destructive impact upon competition which may result from a merger renders it the kind of arrangement as to which expert scrutiny most clearly is to be desired. On the other hand, to leave enforcement of antitrust policy in such cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements

> contrary to the intent of the Shipping Act that industry considerations must be taken into balance in judging industry arrangements."

The FMC is peculiarly well fitted to deal with ongoing conditional acquisitions because it can maintain constant regulatory surveillance of the ongoing relationship between the parties, and because Section 15 expressly authorizes the FMC to cancel or modify an agreement even though it has previously approved it (*see* p. 4 *supra*). The FMC's preliminary order in the Reynolds-U.S. Lines transaction makes clear the extent of the regulatory jurisdiction which the FMC can and will exercise over such a continuing relationship. Among other things, the order contemplates that the Board of Directors of U.S. Lines shall have one "public member" (5a); that all common agents and facilities, charters, and service rationalization agreements between Sea-Land and U.S. Lines must be specifically approved by the FMC (6a); and that the FMC's approval of the transaction will be subject to continuing review (4a). Such continuing regulatory control of all aspects of the ongoing relationship between two common carriers by water is closely analogous to the continuing jurisdiction of the Civil Aeronautics Board over the acquisition of control of an air carrier, which this Court recently reaffirmed in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 41 U.S.L.W. 4131, 4136-39 (U.S. Jan. 10, 1973). Such ongoing regulatory surveillance in the public interest would be impractical for a court to duplicate under the antitrust laws. Thus the basic public policies underlying the Shipping Act of 1916 strongly affirm the conclusion that Congress intended to give the FMC regulatory jurisdiction over continuing acquisitions.

CONCLUSION

For the reasons given above, the Court need not reach in the present case the question of the jurisdiction of the Federal Maritime Commission over acquisitions which, unlike that involved in the present case, create an ongoing relationship between the parties requiring continuing FMC supervision. If this question is reached in the present case, R. J. Reynolds Tobacco Company respectfully submits that it should be answered in the affirmative.

Dated: New York, New York
January 25, 1973

Respectfully submitted,

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APPENDIX

Order of the Federal Maritime Commission Reopening Proceeding for Limited Purposes

FEDERAL MARITIME COMMISSION

Docket No. 70-51

AGREEMENT OF MERGER NO. 9827-1 AMONG R. J. REYNOLDS TOBACCO COMPANY, RJI CORPORATION, SEA-LAND SERVICE, INC. AND WALTER KIDDE & COMPANY, INC., UNITED STATES LINES, INC.

ORDER REOPENING PROCEEDING FOR LIMITED PURPOSES

The Commission[1] is prepared to approve the acquisition by R. J. Reynolds Tobacco Company (Reynolds) of all the outstanding common stock of United States Lines, Inc. (USL) held by Kidde subject to conditions which assure the maintenance of U.S.L. as a viable independent corporation with Reynolds providing financial assistance to maintain U.S.L. as such a corporation.

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[1] Commissioner Day holds that the Commission is without jurisdiction over the Agreement under consideration but since four members of the Commission vote affirmatively on that issue he would join Commissioners Hearn and Morse in issuing this Order.

Chairman Bentley and Vice-Chairman Barrett vote against the issuance of this Order.

We are disposed to make this determination to help create continued substantial American-flag participation in international maritime competition. Our approach is with a view toward maintaining USL as a strong independent U.S.-flag carrier, and precluding its dismemberment. The latter possibility is very real under the intent of the Supplemental Agreement as indicated by its terms; and to permit such an eventuality would be a disservice to the American merchant marine and a severe detriment to the public interest in a strong and competitive American merchant fleet.

Under the current and developing structure of international ocean commerce, there is a great need to assure the continued operation of efficient and productive U.S.-flag carriage in all major trades. Consequently, our inclination to approve the acquisition would not result in an approval of the type of corporate consolidation wherein one company survives and the other does not. Our desire is rather to ensure the survival of existing American-flag service by permitting the infusion of new and private capital into our merchant marine fleet. What we envision here are two independent companies to be operated under a continuing Sec. 15 agreement.

As a result we envision stronger U.S.-flag competition in international maritime markets; vigorous competition for United States military and government controlled cargo; and FMC access to carrier data used in arriving at rates for government cargo.

On the strength of the conditions to approval set forth below and others which may be suggested, the Commission will be able to assure the above benefits, and we will be

able also to prevent any restraint of trade without need or justification; to assure our continuing surveillance and review of Reynolds/Sea-Land and USL activities through receipt of periodic reports; and to retain a practicable option to dissolve the acquisition upon breach of any conditions attached to the acquisition.

We reject a negativist approach to the issues in this case and we will make every effort not only to forestall impediments to the competitive effectiveness of our merchant marine but we will take positive action to improve the competitive thrust of our merchant fleet.

As to those conditions that we would impose to obtain the desired result, we fully appreciate that it is not possible to crystalize these conceptual limitations without the customary benefit of assistance from all parties. We deem it desirable to obtain the assistance and comments of all parties in order to establish appropriate conditions without reconciling the various contentions of all parties to this proceeding. Accordingly, we are reopening the proceeding for this limited purpose.

Additionally, we are neither oblivious of nor insensitive to the argument made that we lack jurisdiction to modify the Agreement under consideration to the extent proposed. However, we think it more appropriate to treat that principle of law in our Report following this limited reopening. Our immediate objective is to secure the views of all parties on the conditions listed below, including any others which may be suggested concurrently by the parties in their opening memoranda filed in response to this Order prior to the issuance of our Report and Order.

Order of the Federal Maritime Commission Reopening Proceeding for Limited Purposes

THEREFORE IT IS ORDERED, That pursuant to sections 15, 21 and 22 of the Shipping Act, 1916, the proceeding shall be reopened for the limited purpose of the submission of memoranda and replies and oral argument if requested or considered necessary by the Commission, directed to the following proposed conditions including those submitted by the parties themselves:

I. The stock of U.S.L. is to be transferred to RJI to be held by RJI to insure the independence of U.S.L.

A. There shall be no substitution for RJI as the owner of the U.S.L. stock without FMC approval.

B. The existing corporate relationship among Reynolds, RJI and U.S.L. shall be irrevocable except as may be ordered by the FMC.

C. This approval shall be subject to constant surveillance and to review by the Commission at least every 5 years.

D. Reynolds/RJI shall, by agreement, consent that the FMC may require them to divest themselves of U.S.L. stock upon order of the FMC for breach of any condition herein.

E. RJI shall not sell or otherwise dispose of, or encumber by lien, mortgage, or otherwise, the assets of U.S.L. except upon approval of the FMC.

F. No scheme may be adopted by U.S.L., RJI, or Reynolds which would result in the dissipation of the assets or revenues of U.S.L., except that reasonable dividends on U.S.L. stock may be paid so as not to exceed net profits of U.S.L. for the prior corporate fiscal year, based upon sound

accounting principles and after adequate provision for debt servicing.

II. All expenses, debts, and financing of U.S.L. operations shall be assumed by RJI under guarantee of Reynolds.

A. No loans or advances of funds by Reynolds to U.S.L. or to RJI for the benefit of U.S.L. may be secured by the assets or revenues of U.S.L., or by U.S.L. voting stock or other evidence of voting interest in U.S.L., except as may be approved by the FMC.

III. U.S.L. is to be operated by RJI as an independent carrier in all respects in full competition with Sea-Land.

A. U.S.L. and Sea-Land shall not have any common employees, officers, or directors.

1. One director of U.S.L. shall be a "public member": a person experienced in maritime transportation and corporate finance, and he shall be appointed by the Chief Judge of the U. S. Court of Appeals for the District of Columbia.

B. U.S.L. and Sea-Land shall establish and maintain separate bids and tariffs for the carriage of military or other United States Government-controlled or generated cargo.

C. U.S.L. shall maintain membership in its own name in conferences, pools, and other agreements approved by the FMC or hereafter filed for approval except as otherwise authorized by the FMC.

D. U.S.L. and Sea-Land may have common soliciting or husbanding agents, brokers, forwarders, stevedores, attorneys, accountants, or terminal facilities, but only to the extent authorized by the FMC.

E. U.S.L. and Sea-Land shall not share in any pool percentages except as authorized by the FMC.

F. U.S.L. and Sea-Land shall not enter into any ship sale, ship charter, space charter, equipment interchange, transshipment, or any similar type of arrangement, or any type of service rationalization arrangement with each other without FMC approval.

IV. U.S.L. and Sea-Land shall submit to the FMC, in form as prescribed by the FMC, semiannual reports verified by the president and the treasurer or secretary of such corporations with respect to the adherence to all the conditions contained herein.

A. The FMC shall have access to all records of U.S.L. RJI, Reynolds, and Sea-Land with respect to the maintenance of these conditions, particularly, but not limited to, Item III.B.

V. Any party or any person having an interest in the subject matter may at any time petition the FMC for modification of any of these conditions, and jurisdiction shall be retained by the FMC to amend, modify, or cancel these conditions in part or in whole pursuant to such petition or on the Commission's own motion.

VI. As used in these conditions, Sea-Land, Reynolds, RJI, and U.S.L. mean all subsidiary, parent, successor, or other organizations or corporations similarly or otherwise affiliated with Sea-Land, Reynolds, RJI, and U.S.L.

IT IS FURTHER ORDERED, That the memoranda shall be filed by any party on or before July 6, 1972. Replies thereto shall be filed by any party on or before July 26, 1972.

IT IS FURTHER ORDERED, That U.S.L. is to file with this Commission (with copies to all parties) the following financial data:

1. For the year 1971 and for the first three months of 1972, a certified and detailed Balance Sheet and Income (Profit and Loss) Statement, accompanied by appropriate footnotes.
2. These submissions shall bear the certification by the corporate officer responsible for the maintenance of the books, accounts, and financial records of the Company, stating that the books and accounts have been maintained in accordance with an appropriate system of accounts, that the submissions have been prepared from the books of the Company, and that they accurately report those books and accounts.

This data is to be filed at the Office of the Secretary, Federal Maritime Commission, 1405 I Street, N.W., Washington, D. C. 20573, on or before the close of business on July 6, 1972.

FRANCIS C. HURNEY
Secretary

(SEAL)

[Served June 7, 1972]

Federal Maritime Commission
News Release 72-19

FEDERAL MARITIME COMMISSION
Washington, D.C. 20573

FOR IMMEDIATE RELEASE—SEPTEMBER 28, 1972

FMC ACTS IN "MERGER"

By reaffirming its original three-to-two vote, the Federal Maritime Commission today approved, subject to conditions, the acquisition of United States Lines Company by R. J. Reynolds Company.

Under the action, the three assenting Commissioners further restricted the operation of U. S. Lines by Reynolds as a completely separate entity.

U. S. Lines and Sea-Land are the two largest operators of American flag containerships. Under the FMC ruling, the two will be maintained as independent competing American flag steamship lines. U. S. Lines, currently a subsidiary of Walter J. Kidde Company, will function under R. J. Industries, a holding company subsidiary of the Reynolds interests.

The FMC majority opinion repeated its requirement that the two companies be operated competitively and added that they shall operate only ships built and/or converted in the United States under the American flag, manned by American seamen, and discontinue any foreign flag operation within two years. Any foreign flag chartering may be done only with prior FMC approval.

The three commissioners voting approval are George H. Hearn, vice chairman, Clarence Morse and James V. Day. Commissioner Day held that the Commission is without

jurisdiction over the Agreement under consideration but since the majority of the Commission voted affirmatively on that issue he joined Commissioners Hearn and Morse in this action.

Chairman Helen Delich Bentley and Commissioner Ashton C. Barrett reiterated their opposition to the merger or acquisition.

The original order issued June 7, 1972, called for the further action which was announced today. The commission report will follow.

Federal Maritime Commission
News Release 72-20

FEDERAL MARITIME COMMISSION
Washington, D.C. 20573

FOR IMMEDIATE RELEASE, FRIDAY,
SEPTEMBER 29, 1972

F.M.C. CLARIFIES "MERGER" RULING

In response to inquiries with respect to News Release No. 72-19, of September 28, 1972, dealing with the acquisition of United States Lines Company by R. J. Reynolds Company (Docket No. 70-51), the majority will require:

1. The eight SL-7 ships built or being built abroad by Sea-Land be forthwith registered under U. S. flag and U. S. manned.
2. Subsequent shipbuilding or conversions by or for either company be done in U. S. yards.
3. Existing foreign-flag operations by either company be discontinued within two years.
4. Chartering of foreign-flag vessels by either company be done only with prior Federal Maritime Commission approval.

U. S. Lines and Sea-Land are the two largest operators of American-flag containerships. Under the F.M.C. ruling, the two will be maintained as independent competing American-flag steamship lines. U.S. Lines, currently a subsidiary of Walter J. Kidde Company, will function under R. J. Industries, a holding company subsidiary of the Reynolds interests.

Section 15 of the Shipping Act of 1916 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall

Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814

continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve

a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however*, That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel or modify each such agreement in accordance with the provisions of this section.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER,

v.

SEATRAIN LINES, INC.; PACIFIC FAR EAST LINE, INC.; THE OCEANIC STEAMSHIP COMPANY; AND UNITED STATES OF AMERICA, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Appendix to the Petition for a Writ of Certiorari, hereinafter P.A., 17-50) is reported at 460 F.2d 932. The Federal Maritime Commission's order dated October 27, 1970, *Approval of Agreement No. 9903 and Denial of Request for Hearing and Investigation,* not reported in the FMC reports, is found at P.A. 51-54. The Federal Maritime Commission's *Denial of Petition to Reopen the Matter of Approval of Agreement No. 9903,* dated

December 8, 1970, also unreported, appears at P.A. 55-57.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1972. (App. 70-71). The petition for a writ of certiorari was filed June 20, 1972, and was granted December 11, 1972. The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1) and 2350.

ISSUE PRESENTED

Whether the Federal Maritime Commission has jurisdiction under Section 15 of the Shipping Act, 1916, over agreements providing for the acquisition of assets of one carrier by another.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, as amended, 39 Stat. 733, 46 U.S.C. § 814, provides in pertinent part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing,

or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

* * *

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

STATEMENT

1. *The Acquisition Agreement.*

Pacific Far East Line (PFEL) and The Oceanic Steamship Company (Oceanic), common carriers by water in the foreign commerce of the United States, submitted to the Federal Maritime Commission (Commission or FMC) on October 6, 1970, an agreement[1] providing for the sale and transfer to PFEL of four Oceanic vessels in current operation and its interest in two ships then under construction. Included under the transfer agreement were all personnel and shoreside

[1] This agreement, which was assigned FMC No. 9903, is reproduced in part at App. 2-32.

equipment and facilities of Oceanic related to the vessels. While all of its assets were included in this transfer, Oceanic, a wholly-owned subsidiary of Matson Navigation Company, was to retain its corporate existence and was not prohibited from re-entering its former trade or any other trade. The transfer agreement was submitted for Commission determination as to whether it was subject to the approval requirements and antitrust immunity under Section 15 of the Shipping Act, 1916.[2]

Notice of the agreement was published in the *Federal Register* on October 14, 1970. On October 21, 1970, Seatrain Lines, Inc., also a common carrier by water in the United States foreign commerce, protested approval of the agreement and requested a hearing.[3]

2. *FMC Proceedings.*

On October 27, 1970, the Commission denied[4] Seatrain's request for hearing and approved the agree-

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[2] See letter of transmittal and supplement thereto at App. 33, 34.

[3] App. 35-37.

[4] Denial of the request for hearing and approval of the agreement was predicated on Seatrain's failure to show any immediate likelihood of real injury as a result of such approval since Seatrain's entry into the trade in question at that time was conjectural and nothing in the agreement would preclude such entry at a future time. While the failure to hold a hearing was noted in the opinion below (P.A. 48), the Commission, acting upon the holding in *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577 at 587 (D.C. Cir. 1969) "if no substantial issues are raised it may then be proper for the Commission to proceed and approve the agreement," found that Seatrain's protest presented no real, immediate or substantial issue. See P.A. at 53.

ment.[5] Whereupon, Seatrain sought reopening for reconsideration of the Commission order of approval.[6] On December 8, 1970, the Commission denied the motion for reconsideration on the ground that Seatrain had raised nothing to show that approval had been improper.[7]

3. *Court Proceedings.*

On February 8, 1971, Seatrain petitioned the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 2342(3) for review of the Commission's order approving the agreement. The principal basis for Seatrain's petition was that the Commission erred in failing to hold a hearing prior to approval of the agreement despite Seatrain's timely protest. However, the Department of Justice, statutory respondent representing the United States and challenging the Commission's Section 15 authority over mergers and acquisitions between ocean-going carriers in another proceeding,[8] again raised the juris-

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[5] See Commission Order dated October 27, 1970, P.A. 51-54.

[6] App. 41-51.

[7] See Commission Order dated December 8, 1970, P.A. 55-57.

[8] In *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F.Supp. 656 (D.N.J. 1971), the Commission's Section 15 authority over acquisitions and mergers and its primary jurisdiction under the doctrine of *Far East Conference* v. *United States*, 342 U.S. 570 (1952), was challeneged by the Department of Justice, which brought an antitrust action in the District Court of New Jersey to enjoin the implementation of an agreement then pending before the Commission, the proposed acquisition of United States Lines, a common carrier by water, by R. J. Reynolds Tobacco Company, parent company of

dictional question as to whether the Commission's statutory authority covered the acquisition by PFEL of Oceanic's assets. Focusing on this question, the court of appeals concluded ". . . that it is not the Federal Maritime Commission which has the duty to approve or disapprove the type of contract made the subject of this litigation." (P.A. 49). Having so ruled, the court found it unnecessary to reach any other issue raised in the proceeding (P.A. 50).

SUMMARY OF ARGUMENT

Section 15 of the Shipping Act, 1916, requires that ocean-going common carriers file for Commission* approval, *inter alia*, "every agreement . . . controlling, regulating, preventing, or destroying competi-

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another carrier by water, Sea-Land Service, Inc. While permitting the Commission to intervene in the antitrust action, the district court refused to dismiss or stay its proceeding pending the outcome of the Commission's hearing on the acquisition, and in a written opinion held that Section 15 of the Shipping Act did not give the Commission authority over mergers and acquisitions in the shipping industry. While a petition for writ of certiorari in *R. J. Reynolds Tobacco Company, et al.* v. *United States and Federal Maritime Commission*, No. 71-157, is pending before this Court to review the district court decision involving the original Reynolds' agreement to acquire United States Lines, a revised and *different* agreement was submitted and is currently before the Commission under Section 15 for approval of Reynolds' conditional acquisition and operation of United States Lines.

*"Commission" refers to the Federal Maritime Commission [75 Stat. 840 (1961)] and its predecessors, the United States Shipping Board [39 Stat. 728, 729, 733(1916)]; the United States Shipping Board Bureau of the Department of Commerce [Exec. Order No. 6166, § 12 (1933)]; the United States Maritime Commission [49 Stat. 1985(1936)]; and the Federal Maritime Board [64 Stat. 1273 (1950)].

tion." That an acquisition of assets of one carrier by another falls within the ambit of Section 15 is amply demonstrated by a careful examination of the plain meaning of the language of the statute, the legislative history of Section 15 and subsequent legislative action, the established national policy governing maritime regulation, and the judicial and administrative construction of Section 15.

I

It must follow from the plain meaning of the language of Section 15 that an agreement for the acquisition of all the assets of one carrier by another carrier is quite literally an agreement that controls, regulates, prevents or destroys competition. Section 15 is applicable to "every agreement" and the word agreement includes "understandings, conferences, and other arrangements." This Court has cited approvingly the Commission's own view of the unambiguity of that section: " 'Section 15 describes in unambiguous language those agreements that must be filed. . . . Since the wording of Section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve.' " *Volkswagenwerk A.G.* v. *Federal Maritime Commission,* 390 U.S. 261, 274, 275 (1968).

None of the canons of statutory construction gives comfort to those who would suggest that the plain meaning of Section 15 is circumscribed or limited to those agreements which are subject to continuing supervision by that section's concluding catchall phrase "or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

An acquisition of assets agreement, although a single, discrete event, is always subject to the withdrawal of Commission approval and consequent attack by the Department of Justice under the antitrust laws.

Section 15 grants this Commission explicit power to exempt from the antitrust laws those agreements which have been duly approved. Therefore, the rule that repeals of the antitrust laws by implication are disfavored has no application to this situation.

II

Although the legislative history could have stated more affirmatively Section 15's intended coverage, it does evince a clear intention on the part of Congress to bring every described agreement between ocean-going carriers under the scrutiny of a specialized body of experts. The Congressional Committee investigating the malaise of the shipping industry in 1914 was well aware of the then prevalent means of attenuating competition by various agreements, including merger, acquisition, and consolidation.

The Committee's investigation included the distribution of questionnaires to shipping concerns seeking information, *inter alia*, on their formation and industry consolidations and acquisitions; the Committee's work and findings were synthesized into what is now known as the Alexander Report.[10] This report concluded that although in the foreign trade, competition was primarily controlled by agreements which regulated rates,

[10] H.R. Doc. 805, 63rd Cong., 2d Sess. (1914) [hereinafter Alexander Report].

arranged for pooling of revenues and allotted sailings, competition in the domestic trade was controlled in large part by consolidations.

The Report made several recommendations, among which was that all agreements be required to be filed for approval with the Interstate Commerce Commission. In adopting these recommendations, Congress required that the agreements be filed with the newly created Shipping Board; no distinction was made between the foreign and domestic trades, so that the word "agreement" as used in Section 15 was meant to cover mergers, acquisitions, and consolidations in both trades.

While it is true that "[s]ubsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant, . . . [it] is entitled to weight when it comes to the problem of construction." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958). An oft-cited piece of legislation which bears upon the construction of Section 15 is the 1950 amendment to Section 7 of the Clayton Act, in which Congress specifically exempted from the reach of that section's prohibitions, "transactions duly consummated pursuant to authority given by" various federal agencies including this Commission. It is clear that the exemption paragraph did not confer any new powers upon this agency, but the acceptance by Congress of the Commission's request for inclusion indicates a Congressional understanding of Section 15's coverage inasmuch as Section 7 of the Clayton Act deals with acquisitions of stock and assets.

A similar understanding regarding Section 15's application is reflected by Congress in considering proposed pre-merger notification legislation during the period 1956-1960, and during a Congressional Committee's investigation begun in 1962 of the Commission's regulation of the shipping industry.

III

If acquisition agreements between ocean carriers are not given some protection from the full thrust of the antitrust laws, the aims and policy of the Shipping Act may be seriously curbed or defeated. A fundamental objective of the Shipping Act, 1916, repeatedly stressed by this Court, was to create an administrative body with maritime expertise to regulate ocean shipping. *Far East Conference* v. *United States*, 342 U.S. 570, 573-576 (1952); *United States Navigation Co.* v. *Cunard S.S. Co., Ltd.*, 284 U.S. 474, 485 (1932). Unless such regulatory jurisdiction included authority over consolidations, mergers, and acquisitions by and among industry members, regulation by the expert agency would be greatly curtailed, if not completely nullified in many instances.

With respect to acquisitions and merger transactions in the shipping industry, Commission expertise must be called upon to reconcile conflicting national policies represented by the Shipping Act and the antitrust laws. To allay any fears that antitrust attention would not be given to merger and acquisition agreements filed for the Commission's approval, *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), shows clearly that antitrust principles are

to be weighed and balanced by the Commission against industry considerations in deciding the approvability of such agreements. However, the public interest in paramount industry considerations would be sacrificed were merger and acquisition transactions in the shipping industry open to attack by either the Federal Trade Commission or the Department of Justice and the legality of such transactions measured solely by competitive standards under the antitrust laws. In such cases, there would be no opportunity for the public policy objectives of the Shipping Act to prevail.

In deciding that "agreements other than those of a continuing nature" were not meant to be subject to the Commission's jurisdiction, the court below noted, but refused to follow, the mandate of this Court giving Section 15's coverage broad construction. As clearly stated by this Court in *Volkswagenwerk,* 390 U.S. 261, 273-276, Section 15 "uses expansive language" and should be construed broadly so as to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." Given these guidelines, the Ninth Circuit Court of Appeals correctly concluded in *Matson Navigation Co.* v. *Federal Maritime Commission,* 405 F.2d 796 (9th Cir. 1968) that merger agreements were plainly encompassed by Section 15.

Although the final authority as to statutory construction rests with the courts, "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts. . . ." *Volkswagenwerk,* 390 U.S. 261, 272. This agency has continuously construed Section 15 as conferring jurisdic-

tion over mergers, acquisitions, and like transactions. The docketed and reported proceedings include several merger or consolidation agreements; sales of goodwill, ships and other assets; and transfers of stock and other operating assets: *New York and Porto Rico Steamship Company Agreement,* 2 U.S.M.C. 453 (1940) (sale of goodwill and agreement not to compete for ten years); *Agreements 8745 and 8745-1,* 7 F.M.C. 199 (1962), *Agreement No. 8555,* 7 F.M.C. 125 (1962) (sale of assets and agreement not to compete); *Merger—American Mail Line and Pacific Far East Line,* 11 F.M.C. 53 (1967), reversed on other grounds, *Matson Navigation Co. v. F.M.C.,* 405 F.2d 796 (9th Cir. 1968) (merger or consolidation of three steamship lines); *Agreement No. 9810,* 13 F.M.C. 156 (1969) (transfer of stock and operating assets); *Agreement No. 9905,* 14 F.M.C. 163 (1970) (sale of all four vessels operating in a particular service); *Agreement No. 9827-1,* currently pending decision before the Commission [11] (agreement of merger between U.S. Lines, Inc. and Sea-Land Service, Inc.).

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[11] Notwithstanding the holding of the district court in *United States v. R. J. Reynolds Tobacco Corp.,* 325 F. Supp. 656 (D.N.J. 1971), that the Commission did not have jurisdiction over the merger agreement there involved, the Commission has continued its administrative hearing on this agreement.

ARGUMENT

I. JURISDICTION OVER ACQUISITION AGREEMENTS BETWEEN OCEAN CARRIERS IS FOUNDED UPON A CLEAR AND UNEQUIVOCAL EXPRESSION OF CONGRESS AUTHORIZING THE FMC TO APPROVE, DISAPPROVE, OR MODIFY AGREEMENTS CONTROLLING, REGULATING, PREVENTING, OR DESTROYING COMPETITION.

A. *An Agreement for the Acquisition of the Assets of One Carrier by Another Is, Literally, an Agreement "Controlling, Regulating, Preventing, or Destroying Competition."*

Prior to PFEL's purchase of Oceanic's assets, both of these common carriers by water operated in Pacific Ocean trades between the West Coast of the United States and South Pacific points. While Oceanic operations over Trade Route 27 to Australia-New Zealand were not directly competitive with PFEL sailings over Trade Route 29 to Guam, acquisition of the Oceanic vessels in operation and under construction eliminated potential competition between these carriers and enhanced PFEL's competitive position with respect to other trans-Pacific carriers. The acquisition agreement between these two common carriers, therefore, clearly resulted in or had the effect of "controlling, regulating, preventing or destroying competition"—language of the Shipping Act's Section 15.

In determining the purpose of a statute, this Court has stated that, "[t]here is, of course, no more persuasive evidence . . . than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Association,* 310 U.S. 534,

543 (1940). Although "acquisition, merger, or consolidation" agreements are not specifically enumerated in the language of Section 15, neither are the countless other types of agreements over which this agency has asserted jurisdiction, i.e. terminal leases, long-term charters, transshipment agreements, and joint service contracts, to name but a few. In *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261, 273, this Court held that the FMC had taken "an extremely narrow view of a statute that uses expansive language" in refusing to find subject to Section 15 an agreement among members of a maritime collective bargaining association to allocate among themselves the costs of a fund to mitigate the impact upon employees of technological unemployment, the "Mech Fund". Although "Mech Fund" agreements were not specifically enumerated in that Section, this Court found that such an agreement would have the effect of controlling, regulating, preventing, or destroying competition and held that the Commission erred in declaring that the agreement was not subject to Section 15. Just as in *Volkswagenwerk*, where "Mech Fund" coverage was not specifically spelled out, it is unnecessary for mergers, acquisitions, and consolidations to be expressly enumerated for coverage under the broad sweep of Section 15's language.

Those who would give Section 15 a more circumscribed application have argued mainly that the final category of agreements enumerated in this Section—"or in any manner providing for an exclusive, preferential, or cooperative working arrangement"—is a qualification of the preceding six categories and is meant to limit their application to only those agree-

ments of an on-going nature. Such an interpretation would render superfluous six of the seven categories of Section 15. That construction has been rejected by this Court in *Volkswagenwerk,* 390 U.S. 261, 275, n.23, as well as the Ninth Circuit Court of Appeals in *Matson Navigation Co.* v. *Federal Maritime Commission,* 405 F.2d 796, 799, n.7. Yet this was the rationale applied by the court below (P.A. 22), as well as the district court in *United States* v. *R.J. Reynolds Tobacco Co.,* 326 F.Supp. 656, 659, which held that "an agreement of merger, which is essentially a single, discrete event" was not within the ambit of Section 15. In view of its concern, as expressed in the Alexander Report and considered more fully below, with the entire spectrum of anticompetitive activity in the shipping industry, Congress can hardly be attributed, in the absence of a clear expression to the contrary, with the intent to exclude agreements that are not of a continuing nature but otherwise fall squarely within the categories described in Section 15. Moreover, it would be inconsistent with the regulatory scheme of the Shipping Act not to make this type of agreement "controlling, regulating, preventing, or destroying competition" subject to Commission scrutiny and approval or disapproval under the same standards applicable to all other agreements having the same effects, simply because this type of agreement is consummated in a "single, discrete event."

That Congress, in 1916, was aware of the effects on competition of mergers and acquisitions is evidenced by this Court's holding just four years earlier that the Sherman Act was applicable to the acquisition by one

company of a controlling stock interest in its competitor. As stated in *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 61, 86 (1912), such an acquisition was barred by the Sherman Act since it had the effect of "destroying or restricting competition" with the competitor. Thus, Congress knew that mergers, acquisitions or consolidations could control, regulate, prevent, or destroy competition and the use of such language in Section 15 can only be interpreted as being meant to encompass those transactions. Congress had also dealt with such anti-competitive arrangements in its deliberations on the Clayton Act, 38 Stat. 730, and the Federal Trade Commission Act, 38 Stat. 717, both enacted two years prior to the Shipping Act.

A different argument that has been made against Section 15's expansive coverage is that the other two transportation regulatory agencies, the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB) both have been given explicit statutory authority over acquisitions, 49 U.S.C. § 5(2) and 49 U.S.C. § 1378, respectively, while the FMC has not. But this argument gives way readily upon a careful examination of the statutory language and legislative history of the acquisition authority of these other transportation agencies.

The original Section 5 of the Interstate Commerce Act (24 Stat. 379), enacted in 1887, was confined to an outright prohibition against the pooling of revenues of competing carriers. A 1912 amendment to Section 5 (37 Stat. 566) increased ICC acquisition authority only to the extent that rail carriers were prohibited from owning or controlling water carriers over com-

peting routes. Enactment of the Shipping Act in 1916, granted considerably more authority to this Commission than was then conferred upon the ICC. In 1920, Section 5 of the Interstate Commerce Act was again amended (41 Stat. 480) to permit the ICC to approve pooling agreements and limited consolidations and to immunize approved transactions from the antitrust laws. It was not until 1940 that the Interstate Commerce Act provided for approval of consolidations, mergers, and acquisitions on a broad scale (54 Stat. 905).

The Civil Aeronautics Act was passed in 1938 (52 Stat. 973) and granted specific authority to the CAB (then the Civil Aeronautics Authority) over mergers, consolidations, and acquisitions in Section 408[12] of the Act, as well as a general authority in Section 412[13] over agreements "for controlling, regulating, preventing, or otherwise eliminating *destructive, oppressive, or wasteful competition . . . or for other cooperative working arrangements.*" [Emphasis added]. The CAB has construed that Act as requiring approval of merger and acquisition agreements pursuant to both the general coverage of Section 412 as well as the specific provisions of Section 408. See *Acquisition of Marquette By TWA*, 2 C.A.B. 1, 4 (1940).

The narrow prohibition against pooling in Section 5 of the ICC's organic statute, which differs from the broad coverage of Section 15 of the Shipping Act, was enlarged somewhat in 1920 and then again to a greater

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[12] 49 U.S.C. § 1378.
[13] 49 U.S.C. § 1382.

degree in 1940 in order to grant the ICC authority over mergers, acquisitions, and consolidations. Specific merger and acquisition authority given to the CAB, however, did not occur until some 22 years after the creation of the Shipping Act. Thus, with an initial granting of the broadest authority in Section 15 of the Shipping Act over anti-competitive agreements found in the maritime industry, subsequent specificity by Congress in the statutes of the ICC and the CAB cannot be said to diminish the earlier authority granted to this Commission.

The lower court has also suggested that the Commission should not be vested with such jurisdiction because of its failure to hold a hearing in this case (P.A. 48). There is a dearth of authority for the proposition that improvidently exercised jurisdiction is dispositive of the question of its existence. A hearing was not held on the basis of the same lower court's mandate in *Marine Space Enclosures* case, 420 F.2d 577, 587, and because of the protestant's failure to show real or immediate harm, but this in no way establishes why the Commission lacks or should be denied jurisdiction over the subject matter.

B. *Exemption of FMC Approved Agreements of Merger and Acquisition from the Antitrust Laws Pursuant to Section 15 Does Not Constitute an Implied Repeal of the Antitrust Laws.*

The doctrine that antitrust laws are not to be repealed, nor their exemptions expanded, by implication is well recognized; however, the cases most often cited

for that proposition involved either transactions that were without the defined area of agency action, or agency approval which, though required by statute, did not carry antitrust immunity.[14]

Positioned squarely within the parameters of Section 15 is authority for the FMC to exempt from the provisions of the antitrust laws "every agreement, modification, or cancellation lawful under this section. . . ." This explicit FMC authorization is to be compared with the statutes of governmental agencies that have relied upon an implied authority for immunizing transactions from antitrust coverage. In *Milk Producers Association* v. *United States*, 362 U.S. 458, authority was granted to the Secretary of Agriculture by Section 8(b) of the Agricultural Adjustment Act (7 U.S.C. § 608b) to approve and exempt from the antitrust laws agricultural marketing agreements. This Court held that authority granted for marketing agreements did not extend to an agreement for acquisition of the assets of a competitor. Likewise, in *California* v. *Federal Power Commission*, 369 U.S. 482, an acquisition by El Paso Natural Gas Company of the stock of the Pacific Northwest Pipeline Corporation was found not covered by the certificate of public convenience and necessity provision of Section 7 of the Natural Gas Act (15 U.S.C. § 717f), since that section conferred jurisdiction on the Federal Power Commission (FPC)

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[14] *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *Milk Producers Association* v. *United States*, 362 U.S. 458 (1960); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

over the acquisition of assets but not over stock acquisitions. In addition to the fact that the stock acquisition agreement fell outside the scope of FPC authority, Commission approval of the subsequent asset acquisition agreement was held not to confer antitrust immunity upon that transaction. This Court stated that, "[W]hile 'antitrust considerations' are relevant to the issue of public interest, convenience, and necessity' . . . there is no 'pervasive regulatory scheme' . . . including the antitrust laws that has been entrusted to the [Federal Power] Commission. . . ." 369 U.S. at 485. The language of the Natural Gas Act was compared with the statutory language of the Interstate Commerce Act, which patently exempted approved mergers and acquisitions from the antitrust laws, 49 U.S. § 5(11).

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, a merger of two banks approved by the Comptroller of the Currency pursuant to the Bank Merger Act of 1960 (12 U.S.C. § 1828c) was attacked by the Department of Justice. It was argued that the Bank Merger Act, by directing the involved banking agencies to consider competitive factors before approving mergers, immunizes approved mergers from challenge under the antitrust laws. In response to that argument, this Court pointed out that,

> No express immunity is conferred by the Act."[27]
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27. Contrast this with the express exemption provision of, e.g., the Shipping Act, 46 U.S.C. (1958 Ed. Supp. III) § 814. . . . 374 U.S. at 350.

The specific statutory authority given to the Commission to exempt Section 15 transactions from antitrust coverage, therefore, is clearly distinguishable from the implied or derivative authority which the Secretary of Agriculture, Federal Power Commission and Comptroller of the Currency attempted to assert in order to grant antitrust immunity.

While an agreement of merger, acquisition, and consolidation has been characterized in the *Reynolds Tobacco Co.* case, 325 F.Supp. 656, 659 as "a single, discrete event", this is not to suggest that the FMC would lack jurisdiction over such agreements because it could not exercise continuing supervision over them and fashion divestiture or other equitable relief. This agency would be confronted with no more difficult impediment than that faced by the Federal Trade Commission in ordering, or the courts in decreeing, divestiture relief for antitrust violations." Likewise, this Commission believes it has the power to devise appropriate relief; were the resulting entity of a merger or acquisition transaction to engage in activities violative of the Shipping Act or the antitrust laws, the Commission could disapprove the underlying agreement, thereby laying the transaction open to attack under the antitrust laws.

This Court has recognized that administrative agencies have the power to fashion appropriate relief. That power has been analogized "to the power of courts to fashion Sherman Act decrees. . . . Likewise, the power

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" Cf. *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966).

to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority. . . ." *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 312, n.17 (1963).

In light of the plain language of Section 15 and with no clearly expressed Congressional intent to the contrary, the Commission cannot do other than subject to its scrutiny merger or acquisition agreements, the effects of which may control, regulate, prevent or destroy competition in our nation's maritime commerce.

II. THE LEGISLATIVE HISTORY OF SECTION 15 NOWHERE ESTABLISHES OR SPECIFIES ANOTHER OR CONTRARY INTERPRETATION OF THE PLAIN IMPORT OF THE LANGUAGE OF THAT SECTION.

A. *Congress Was Fully Cognisant of Acquisitions, Mergers and Consolidations in the Shipping Industry and Provided for Their Coverage by Enacting the Shipping Act.*

The Congressional action that finally culminated in the publication of the Alexander Report began in earnest with the introduction in 1912 of House Resolution 425 [10] directing that,

> [t]he Committee on the Merchant Marine & Fisheries be, and is hereby, empowered and directed to make a complete and thorough investigation of the methods and practices of the various steamship lines, both domestic and foreign, engaged in carry-

[10] H.R. Res. 425, 62d Cong., 2d Sess. (1912). Alexander Report at 8.

ing our over-sea or foreign commerce and in the coastwise trade . . . ; and to investigate whether such ship lines have formed any agreements, conferences, pools, or other combinations among each other . . . for the purpose of preventing or destroying competition; . . . and said committee . . . shall further investigate what effect such combinations, agreements, and practices of . . . over-sea shipping lines, whether domestic or foreign, if any are found to exist, have on the commerce and freight rates of the United States. . . .

House Resolution 425 was subsequently broadened in order to expand the scope of the investigation to include ownership of ship lines by other ship lines as well as by railroads. House Resolution 587 [11] provided that the Committee on the Merchant Marine and Fisheries shall investigate whether the "ship lines, both domestic and foreign, engaged in carrying our over-sea or foreign commerce and in the coastwise and inland commerce . . . have formed any agreements, understandings, working arrangements, conferences, pools, or other combinations among one another . . . for the purpose of . . . preventing or destroying competition."

Pursuant to House Resolution 587, a schedule of inquiries was submitted by the Committee to domestic water carriers. These carriers were queried, *inter alia*, as to their formation, whether by consolidation, merger, or other manner:

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[11] H.R. Res. 587, 62d Cong., 2d Sess. (1912). Alexander Report at 1.

5. If your corporation, firm, or line, at the time of its organization, represented a consolidation or merger of any companies, firms, or individual carriers, give the names and addresses of all the companies, firms, and individual carriers thus consolidated or merged.

6. Give the names and addresses of all corporations, firms, or individual carriers which your company, firm, or line has acquired, either by purchase, lease, or otherwise, since its organization.

7. Give the names of all corporations, any portion of whose common or preferred stock, or bonds, short-term notes or other securities, has been acquired by purchase, by exchange, or otherwise, by your company, firm, or line.

* * *

14. Give the names and addresses of all corporations and firms owning stocks or bonds or other securities in your company.

* * *

16. If your company, firm, or line is the owner of any stocks or bonds or other securities in any . . . navigation company or companies, or any other common carriers . . . give the names and addresses of all such companies . . .

Instructions for answering question 17. Under the heading 'Control, how established,' should be entered the form of control exercised, i.e., whether through title to voting securities; any agreement, other than through title to securities, to name

majority of directors . . . *Also specify all those controlled corporations, firms, or lines which are inactive.* [Emphasis in original].

17. If your company, firm, or line controls, either directly or through any other company or firm, any . . . navigation companies, firms, or lines, or any other common carriers . . . by ownership, by lease, by mortgage, or otherwise, give the names and addresses of all the companies and firms thus controlled.

The findings of the Committee were thoroughly documented in a four volume work entitled *Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations Under H.Res. 587,* of which the Alexander Report,[11] constituting the summary of those findings, is Volume IV. Throughout the first three volumes of the *Proceedings* there are numerous references to control of competition in the United States foreign and domestic trades not only through conferences, pooling, rebates, and working arrangements, but through merger, consolidation, and acquisition. The following table identifies and contains references to portions of the *Proceedings* dealing with the Committee's concern over mergers, acquisitions and consolidations in the shipping industry.

Reference	Volume	Page
Acquisition of Prince Line and Lamport & Holt Lines by Royal Mail Line.[12]	I	17

[11] Named after the Chairman of the Committee on the Merchant Marine Fisheries, Joshua W. Alexander.

[12] The resulting entity was referred to by a witness as a "combination". Later, various witnesses repeatedly mentioned the merger

Reference	Volume	Page
Acquisition of Atlas Line by Hamburg—American Line.[20]	I	319
Acquisition of Union Steamship Company by the Indra and Hamburg—American Lines.[21]	I	326
International Mercantile Marine Company acquired International Steam Navigation Company and its subsidiary lines and the Oceanic Steamship Co.[22]	I	345
Hamburg—American acquired the assets of the Eagle Line.[23]	I	351
W.R. Grace & Co. owned the New York & Pacific Steamship Company and the Merchants' Line.	I	465
North German Lloyd, the Hamburg—American Line and the International Mercantile Marine Co. owned 51 percent of the stock of Holland—American Line.	I	568
Atlantic, Gulf and West Indies Steamship Co. owned the New York & Porto Rico Steamship Co., the Mallory Line, the Clyde Line, and the New York & Cuba Mail Line.	I	643, 644

in connection with the monopolization of the South-American trade, the resultant elimination of competition, and the inevitable rise in the freight rate on coffee. See Volume I at 50, 90-93, 128, 215, 239.

[20] Atlas Line was the only carrier in the New York/Haiti trade.

[21] The Indra and Hamburg-American Lines later became known as the United States and China-Japan Steamship Line in the United States Atlantic/East Asia trade.

[22] In addition, the company owned or controlled the Atlantic Transport Line, the National Steamship Co., the Dominion Line, and the Leland Line, as well as a 25 percent interest in the Holland-American Line. Vol. I at 574. The International Mercantile Marine Company was notorious for its acquisition of steamship lines. It was said to have been created as a result of J.P. Morgan's efforts to form a combination of shipping lines. Vol. I at 837.

[23] The "Union Line was practically, under an agreement, acquired later by the Hamburg-American Line." Vol. I at 351.

Reference	Volume	Page
United Fruit Co. was formed by acquiring several companies engaged in the production, transportation, distribution, and sale of bananas.	I	720
Consolidations involving Hamburg—American and North German Lloyd, Hamburg—American and Scandinavian—American Line, and Holland—American.	II	758, 759
Purchase of a line of vessels by Royal Mail Line.[24]	II	813

Volume III of the *Proceedings*, entitled *Special Diplomatic And Consular Reports*, consisted of answers filed by diplomatic and consular officers of the United States in foreign countries, in response to interrogatories submitted by the Department of State dealing with methods and practices of steamship lines engaged in the foreign trade of the United States.

The report of the American Consul at Liverpool contained a detailed discussion of the holdings of the International Mercantile Marine Company, "commonly known as the 'Shipping Trust.'" Vol. III at 139. In discussing the formation of the trust, the Consul stated that "an agreement was concluded between Mr. J. Pierpont Morgan . . . for the purchase of the Oceanic [Steam Navigation Co.]." *Id.* at 140.

The Consul General at Rio de Janeiro mentioned the acquisition of Lamport & Holt and the Prince Line by The Royal Mail Steam Packet Co. *Id.* at 219.

[24] This purchase was viewed as foreshadowing a war between Royal Mail and Hamburg-American.

Volume IV of the *Proceedings*, the Alexander Report, consists of a summary of the findings made in the preceding three volumes and a series of recommendations for legislative consideration in connection with House Resolution 587.

At pages 336-346 of the Alexander Report, a discussion treats consolidations among carriers on the Great Lakes. The attention is focused on an extremely detailed chart depicting the intercorporate and other relations existing between some 37 groups of carriers comprising 105 companies, firms, or managements, operating 453 vessels. Chapter 14 of the Report, "Extent and Methods of Control of Competition between Water Carriers in the Domestic Trade," summarizes the findings thusly:

> The foregoing chapters discuss the control of regular line service in the most important divisions of this country's domestic commerce. . . . It was shown that the line traffic is handled by comparatively few companies and that these are largely controlled by railroads and shipping consolidations. Alexander Report at 403.

With respect to the foreign trade, the Report treats mergers, consolidations, and acquisitions extant in that trade as follows—

> [T]here are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries. (The most notable examples of such consolidations are the International Mercantile Marine Co., the Royal

Mail Steam Packet Co., the Hamburg—American Lines, and Furness, Withy & Co.) *Id.* at 301.

but concluded that,

> it is the almost universal practice for steamship lines engaging in the American foreign trade to operate . . . under the terms of written agreements, conference arrangements or gentlemen's understandings which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. *Id.* at 415.

When the Report reached its recommendations with respect to the foreign trade, however, it did not limit its suggestion to only those agreements enumerated above, but recommended that *all* agreements be subject to the scrutiny of a public agency.

> The consensus of opinion . . . is overwhelmingly in favor of some form of government regulation of steamship carriers engaged in this country's foreign trade. Nearly all the steamship line representatives, who appeared before the Committee, expressed themselves as not opposed to government supervision which is reasonable and which is limited to the requirements of full publicity and approval of *all agreements or arrangements which*

steamship lines may have entered into with other steamship lines. . . . [Emphasis supplied] *Id.* at 307, 308.

More specifically, the Committee recommended,

> [r]elative to such supervisory control by the government of steamship carriers in the foreign trade of the U.S., the Committee offers the following recommendations: (1) That navigation companies, firms, or lines engaged in the foreign trade of the United States be brought under the supervision of the Interstate Commerce Commission as regards the regulation of rates, the approval of contracts entered into with other water carriers . . . and such other conditions of water transportation as affects the interests of shippers. (2) That *all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements . . . entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade. . . .* [Emphasis supplied] *Id.* at 419, 420.

With respect to carriers in the domestic trade, the Committee's recommendations were similar to those for the foreign trade even though it was concluded that,

> Unlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few. Competition in rates between

domestic water lines, however, has been quite as effectively eliminated as in the foreign trade and this has been accomplished by the several lines through one or more of the numerous methods discussed in Part II [including, *inter alia*, consolidations among carriers]. *Id.* at 421, 422.

The recommendations for domestic carriers provided, *inter alia*,

> That water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements affecting interstate transportation . . . with other water carriers . . . *Id.* at 422.

B. *In Enacting Section 15, Congress Followed the Recommendations of the Alexander Report and Intended to Subject to Commission Scrutiny All Those Agreements with Which the Alexander Committee Expressed Concern.*

As this Court has stated in the *Volkswagenwerk* case, 390 U.S. 261, 276:

> Nothing in the legislative history suggests that Congress, in enacting Section 15 of the Act, meant to do less than follow this recommendation of the Alexander Report [that all "agreements" be filed] and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry.

Section 15 of the Shipping Act developed from two

bills, H.R. 14337, and H.R. 15455." The forerunner of Section 15's provisions appeared in H.R. 14337 under Section 3, and required the filing of "every agreement, understanding, conference, or arrangement," and in H.R. 15455 in Section 16, which used only the word "agreement," and defined "the term 'agreement' in this section . . . [as including] understandings, conferences, and other arrangements," which is retained in Section 15's present language. The word "agreement" was clearly intended to have the broadest connotation possible, and was not meant, as characterized in the *Reynolds Tobacco Co.* case, 325 F.Supp. 656, 659, to be "a term of art, a word of technical legal significance." This is apparent from the constant use by both the Committee and Congress of the word "agreement" in describing every arrangement entered into by carriers, including those of acquisition, merger, or consolidation.

Neither one of the two bills made any distinction between agreements in the domestic trade and those in the foreign trade, nor can any discussion be found referring to such a distinction in any of the hearings or committee reports. Congress could readily have provided for the filing of certain agreements in the foreign trade and other types in the domestic trade if such a distinction had been intended. The bill as enacted into law incorporates in toto the recommendations of the Committee with the exception that agreements were to be filed with the United States Shipping Board (an

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[9] 64th Cong., 1st Sess. (1916).

administrative agency created by the Shipping Act) and not the Interstate Commerce Commission.

In the debates, hearings, and committee reports on H.R. 15455, there is ample evidence from which to glean the intent of Congress to subject agreements of merger, acquisition, or consolidation to the scrutiny of a specialized agency. While a principal concern of the Committee, and subsequently the Congress, in dealing with foreign trade, was the conference system, the ultimate purpose of the proposed legislation was to permit anticompetitive agreements in preference to chaotic free competition, as long as those agreements were subjected to government scrutiny and approval.

During the hearings [*] before the Senate Subcommittee a colloquy between Chairman Furnifold McL. Simmons and Arnon L. Squires, attorney, indicates that the Chairman understood the bill to require every conceivable agreement be filed.

> Mr. Squires: In other words, it would never do for any operator to take a chance with that law with that clause in there, with the accepting clause just preceding it, which says, "all other agreements." That means every kind of agreement you can think of. I can not interpret that language any differently.
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> The Chairman: If you are talking about agreements between carriers that is absolutely true . . . . Hearings at 165.

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[*] Hearing Before the Subcommittee of the Committee on Commerce United States Senate on H.R. 15455, 64th Cong., 1st Sess. (1916).

In the hearings on H.R. 14337," Dr. Emory R. Johnson, Professor of Transportation and Commerce, University of Pennsylvania, stated that,

> [t]he bill under consideration by the Committee proposes to substitute Government regulation in the place of unregulated competition and uncontrolled monopoly in the ocean transportation business, the main purposes of the proposed regulation being to insure fair methods of competition, to put a limit upon private monopoly. . . . The bill seeks to extend to the ocean transportation business the standards of fair competition that the act to create a Federal Trade Commission requires of those engaged in commerce. The measure aims to correct the evil results of unregulated competition. . . . Hearings at 11.

Referring specifically to Section 3 of the bill (Section 15), Professor Johnson stated,

> [t]he language is very broad. It gives the board the power to determine what is and what is not in accordance with the public weal in those agreements. It is a very broad power and wisely so, because those agreements, when approved, are by the following language of the act taken out from under the antitrust law. *Id.* at 40.

Later, during those same hearings, Representative Hardy, addressing a witness, George S. Dearborn,

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" Hearings Before the Committee on the Merchant Marine and Fisheries on H.R. 14337, 64th Cong., 1st Sess. (1916).

President, American Hawaiian Steamship Co., stated,

> . . . your ship lines on the ocean in the international and coastwise trade have formed an infinite number of combinations, and they have the power of destroying competition without any restraining power of the Government unless we pass some bill like this. . . . [I]t has been demonstrated through two years of hearings before this committee that on the Lakes, in the coastwise, overseas, and everywhere your regular lines are in vast combinations from the Mediterranean to New York and everywhere. . . . Competition has practically died out. . . . And then, that being the case, are you going to have combination without any restraint at all? *Id.* at 107.

Finally, during the debate on the final bill (H.R. 15455), Representative Alexander stated the issue succintly,

> [w]e investigated every trade area in the world. We developed all the conditions under which the regular lines of vessels in over-sea trade, as well as our coastwise trade, were operating. . . . You will find how close and intimate were the relations between all the regular lines in the coastwise trade and on the Great Lakes and in the overseas trade as disclosed by our investigation. As a result of our investigation we were confronted with the question whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should

be enforced against them and these combinations broken up. . . ."[28]

The course settled upon by Congress was to enact a law recognizing and permitting such agreements between carriers under regulatory control rather than subjecting them to the stringent competitive standards of the Sherman and Clayton Acts.

The Alexander Committee considered consolidation which created a monopoly to be less desirable than the monopoly created by the conference system of rate fixing, apportionment of traffic, and the pooling of earnings.[29] This is shown by the statement in the Alexander Report that if the then prevalent carrier agreements covering rates and other aspects of competition were required to be terminated (as violations of the Sherman Act), there would be "one of two results": rate wars which would mean the elimination of the weak, or, "to avoid a costly struggle, the lines would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement." Alexander Report at 416. The language ultimately adopted by Congress in Section 15, discussed *supra*, made no distinction between consolidation agreements and other agreements such as those creating and implementing conference systems. Moreover, this statement of the Committee does not evince an intent on the part of Congress to

[28] 53 Cong. Rec. 9077, 64th Cong., 1st Sess. (1916).

[29] That is not to say that all consolidations were feared or frowned upon by the Committee (see Alexander Report at 406).

forestall or prevent all mergers and acquisitions among shipping companies. Clearly, Congress was not of the belief that it was impossible to prevent all mergers by legislation" and thus withheld from the Commission authority to pass on mergers in the shipping industry.

The legislative history of Section 15 leaves no question as to whether Congress was fully cognizant of the problems of merger, acquisition, and consolidation in the shipping industry, and its intention to subject agreements providing for those transactions, along with all other anticompetitive agreements, to the scrutiny of a specialized body of experts is plainly apparent. Since this Congressional intent appears throughout every step of the legislative process creating this law, it is hard to follow the lower court's view that Congress "had neither sought information nor had discussion on ship sale agreements. They were neither a part of the problem nor part of the solution." (P.A. 32). With the Alexander Committee's in-depth investigation of and apparent concern over industry mergers and acquisitions, it is unlikely that Congress would have overlooked or neglected to exclude from regulation acquisitions, mergers, and consolidations without so indicating in either the hearings, committee reports, debates, or by express limitation in the Shipping Act.

" In 1914, the year the Alexander Report was submitted to Congress, the Sherman Act had already been in effect for twenty-five years, and had been applied to prevent the consolidation of competitors through common ownership where monopoly or the destruction of competition resulted. (See *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 61 (1912), *supra* at 16). And one of the main purposes of the Clayton Act, enacted in 1914, was the control of corporate acquisitions and unifications.

C. *Post Enactment Consideration of Section 15 by Congress Fully Supports the Shipping Act's Original Intent to Subject Acquisition Agreements to the Commission's Jurisdiction.*

Since the passage of the Shipping Act in 1916, Congress has on a number of occasions considered the scope and application of Section 15 in connection with other legislation. In no instance, however, has there been a subsequent Congressional action or expression that was inconsistent with the Commission's interpretation of Section 15's merger and acquisition coverage. This Court has held that "[s]ubsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In 1950, Congress amended Section 7 of the Clayton Act to include asset as well as stock acquisitions, and exempted from that section's coverage "transactions duly consummated pursuant to authority given by" various federal agencies, among which was the FMC's predecessor, the United States Maritime Commission (64 Stat. 1125). This Section 7 amendment, as originally proposed in H.R. 2734 and as passed by the House, did not include the Maritime Commission among the agencies enumerated in the exemption paragraph. This omission was first called to the Senate Subcommittee's attention by an American shipping association,[22] and then by the Commission, which re-

[22] Hearings on H.R. 2734 Before Subcommittee No. 3 of the Sen-

quested inclusion under Section 7's exemption." The Senate Subcommittee found the Commission's request to be "justified" and amended the bill accordingly." The bill was subsequently enacted with this Senate amendment.

Since Section 7 of the Clayton Act is concerned with acquisitions of stock or assets and not other forms of anticompetitive agreements or arrangements, Congress apparently felt that Section 15 of the Shipping Act was applicable to merger, consolidation, and acquisition agreements. Although it was the view of the Senate Judiciary Committee that the exemption provision gave the Commission no new powers," the inclusion of the Commission in the exemption provision would have been meaningless if the Commission had no authority to "duly consummate" those types of transactions.

Beginning with the 84th Congress in 1956 and in each Congress thereafter until 1962, a number of bills were introduced to require prior notification to the Government of mergers between corporations subject to the Clayton Act." The position of the Commission and maritime industry members during Congressional hearings on this proposed notification legislation was

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ate Committee on the Judiciary, 81st Cong., 2d Sess., at 149-153 (1950).

" Letter from the Commission's Vice-Chairman Grenville Mellen to Chairman of the Subcommittee, Senator Herbert R. O'Conor, September 29, 1949 (National Archives, accompanying papers file, H.R. 2734), appended hereto as Exhibit A.

" S.Rep. No. 1775, 81st Cong., 2d Sess. (1950).

" *Id.*

" E.g., S. 198, H.R. 7698, H.R. 12611, 85th Cong.; S.11, H.R. 10[illegible], 86th Cong.; S. 1802, H.R. 2882, 87th Cong.

that "merger agreements approved by the [Maritime] board under § 15 of the Shipping Act, 1916, as amended, and the resulting mergers are exempt from Section 7."[36]

In 1962, the Antitrust Subcommittee of the House Committee on the Judiciary held hearings to review the Commission's regulation of the shipping industry. The Committee Report (Celler Report) that followed these hearings made reference to the merger between Isbrandtsen Steamship Co. and American Export Lines, the subject of a docketed Commission proceeding in 7 F.M.C. 125 (1962), and reported the transaction as "an agreement recently approved by the Maritime Commission."[37] The Report states that the word "agreement" in Section 15 "is defined broadly so as to encompass 'all understandings, conferences, and other arrangements.'"[38] With respect to this particular committee of Congress, a committee primarily concerned with antitrust matters, there was concurrence with the Commission regarding its Section 15 authority to approve and exempt from antitrust strictures mergers and acquisitions in the shipping industry.

Although subsequent expressions and acts by Congress concededly cannot vest an agency with jurisdiction it plainly lacks, such expressions are an aid in

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[36] Hearings on Legislation Affecting Corporative Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong., 2d Sess. (1956) at 527.

[37] Antitrust Subcommittee of the Committee on the Judiciary, Report on the Ocean Freight Industry, 87th Cong., 2d Sess. at 47. [Celler Report].

[38] *Id.* at 331.

determining the intent of the Congress which enacted the original legislation. In the case at bar such expressions also serve to demonstrate a continuing awareness by Congress of how the Shipping Act was being interpreted and applied by the Commission. Any Congressional disagreement with this agency's interpretation would have been acknowledged or corrected by appropriate legislative action.

III. ACQUISITION AGREEMENTS SHOULD BE SCRUTINIZED, AS CONGRESS INTENDED, BY A TRIBUNAL KNOWLEDGEABLE IN THE PROCEDURES OF BALANCING ANTITRUST CONSIDERATIONS WITH SHIPPING INDUSTRY FACTORS.

A. *The Shipping Act's Design for Effective and Uniform Regulation of the Maritime Industry Does Not Permit the Division of Such Regulatory Authority between Different Government Agencies.*

The Commission is denied one of its most important regulatory tools if authority is not provided by the Shipping Act to approve and immunize merger and other acquisition transactions from antitrust exposure. Confusion in the industry is likely to occur because of the double legal standards that will be applicable to maritime transactions. For the simplest of acquisition transactions between carriers, a space charter or single ship sale for example, the test of legality would be based entirely on the narrow competitive standards of the Clayton Act's Section 7. Conversely, combinations of major ocean carriers engaged in either pooling, price fixing or territorial allocations would be legally adjudged by Shipping Act criteria of which antitrust principles are only one consideration.

A principal purpose of the Shipping Act repeatedly stressed by this Court, was to create an administrative body with maritime expertise to regulate ocean shipping. *Far East Conference* v. *United States*, 342 U.S. 570, 573-76; *United States Navigation Co.* v. *Cunard S. S. Ltd.*, 284 U.S. 474, 485. Unless such regulatory jurisdiction also applied to consolidations, mergers and acquisitions by and among industry members, regulation by the expert agency would be greatly curtailed, if not completely nullified, in many cases. Such an instance could occur if, in the merger of carriers resulting in a needed, single service to a foreign port, Commission approval on public interest grounds under the Shipping Act could be set aside by the improvident application of the Clayton Act's restrictions prohibiting acquisitions that "substantially . . . lessen competition or tend to create a monopoly." Judge Merrill treats this problem in *Matson Navigation Co.* v. *Federal Maritime Commission*:

> The direct and destructive impact upon competition which may result from a merger [in the shipping industry] renders it the kind of arrangement as to which expert scrutiny most clearly is to be desired. On the other hand, to leave enforcement of antitrust policy in such cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements contrary to the intent of the Shipping Act that industry considerations must be taken into balance in judging industry arrangements. 405 F.2d 796, 800.

In dealing with acquisition and merger transactions occurring in the shipping industry, therefore, Commission expertise must be called upon to reconcile the conflicting national policies represented by the Shipping Act and the antitrust laws.

The statutory standards to be applied by the Commission in approving or disapproving an acquisition agreement under Section 15 are specific: whether the transaction would be contrary to the public interest, detrimental to commerce of the United States, unjustly discriminatory or unfair, or violative of the Shipping Act. Since the Section 15 agreement may also interfere with antitrust policies, the Commission must additionally consider, before granting its approval, whether the practices covered by the agreement are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244. The Commission's application of such antitrust principles to a Section 15 agreement was held in the *Svenska* case to be "in full accord with the kind of accomodation between antitrust and regulatory objectives approved by this Court.... Indeed we have stressed that such an accomodation does not authorize the agency in question to ignore the antitrust laws." *Id.* at 245, n.4.

The public interest in paramount industry considerations, however, would be sacrificed if merger and acquisition transactions in the shipping industry were open to attack by either the Federal Trade Commission

or the Department of Justice, and the legality of such transactions measured solely by competitive standards under the antitrust laws. Yet this approach is adopted by the court below in its suggestion that the "Maritime Commission should be free to intervene on behalf of the 'industry viewpoint'" in antitrust proceedings brought by the Federal Trade Commission or the Justice Department. (P.A.48). These latter agencies, however, could not depart from competitive standards in the prosecution of shipping industry mergers and acquisitions, and therefore little attention or relevance would be given to such other industry or Shipping Act considerations. With mergers and acquisitions being thus controlled by antitrust principles, there would be no opportunity for the public policy objectives of the Shipping Act to prevail.

The court below also suggested that the Commission can be ousted from jurisdiction and the aims and objectives of the Shipping Act frustrated by the simple expedient of omitting "on-going" or "continuing" arrangements in drafting agreements of sale or merger in the shipping industry. In recognizing its tenuous position the court explains:

> We recognize that there is a certain apparent inconsistency (more apparent than real) in holding that the parties are not required to file with the Commission and the Commission is not required to approve or disapprove a simple contract for the sale of ships and all assets, and yet a similar contract coupled with an agreement not to compete, which may involve more complicated anti-

trust issues than the more simple sale contract, is required to be filed and the Commission may have jurisdiction to pass on all questions, including anti-trust issues. (P.A. 43)

Thus, if instead of an outright purchase of Oceanic's vessels in the case at bar, PFEL had entered into a long term charter (10-15 years),[*] or coupled the acquisition agreement with a covenant not to compete, the agreement, according to the court below, would have been subject to the Commission's Section 15 jurisdiction. Such an "on-going" arrangement would have little or no different effects under the shipping and antitrust statutes. Therefore, by altering the actual mechanics of an acquisition or merger, the form rather than the substance of the transaction would control the ultimate disposition of any administrative or judicial preceding. Such a result is both unsound and undesirable.

B. *Judicial Construction of FMC Section 15 Authority Accords with the Commission's Interpretation of That Section.*

The Ninth Circuit Court of Appeals, following the *Volkswagenwerk* mandate of this Court, "that the myriad of restrictive agreements in the maritime industry" be subject to Commission scrutiny, held that the Commission had jurisdiction over an agreement to

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[*] An on-going, long term charter agreement was initially before the Commission in the *R. J. Reynolds* case, Docket No. 69-57. The agreement was later restructured into a merger and it was this latter agreement that was the subject of the *Reynolds Tobacco Co.* case, 335 F. Supp. 656. See n.8, *supra*.

merge or consolidate three steamship companies in *Matson Navigation Co.*, v. *Federal Maritime Commission*, 405 F.2d 796 (9th Cir., 1968)." The court below was not in accord with this holding, however, and relied in large part on the decision in *United States* v. *R.J. Reynolds Tobacco Co.*, 325 F. Supp. 656, holding that the Commission was without the requisite authority to pass upon the merger agreement there involved.

The *Reynolds* decision turns mainly on the fact that a merger "is essentially a single, discrete event" and therefore is not subject to the continuing supervision which the court thought was intended for all Section 15 agreements. 325 F. Supp. 656, 659. That argument, however, was considered by the Ninth Circuit in *Matson* and emphatically rejected as being contrary to the mandate of this court in *Volkswagenwerk:*

> The section lists seven categories of agreements, the seventh being agreements "in any manner providing for an exclusive preferential or co-operative working arrangement." Matson reasons that this is a catchall and that it must mean that the preceding six categories are also forms of "working arrangements." A merger, it is argued, would be an anomaly. Once accomplished, nothing remains for supervision. No power of divestiture is conferred upon the Commission. The Supreme Court in

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" See discussion on *Agreement For Consolidation Or Merger Between American Mail Line Ltd., American President Lines Ltd, And Pacific Far East Line, Inc.*, 11 F.M.C. 53 (1967), rev'd on other grounds *Matson Navigation Co.*, v. *F.M.C.*, 405 F.2d 796, *infra*, p. 49.

Volkswagenwerk v. *FMC* . . . rejected reasoning of this sort as a basis for narrowly construing the broad language of the Act. 390 U.S. at 273-275 & n.23. *Matson Navigation Co.* v. *FMC*, 405 F.2d 796, 799, n.7.

The court below took a restrictive view of the *Volkswagenwerk* guidelines, as did Judge Garth in the *Reynolds* case. The misapplication of those guidelines should be rejected as inconsistent with this Court's interpretation of the requirements of Section 15.

This Commission has maintained a continuing surveillance over industry mergers, acquisitions, and consolidations, and has consistently required agreements for such transactions to be filed for Commission approval or disapproval pursuant to Section 15. The first documented case before the Commission involving an agreement of acquisition or merger was *New York and Porto Rico Steamship Company Agreement*, 2 U.S.M.C. 453 (1940). The agreement provided for the sale of good will and a concomitant agreement not to compete for ten years. The Commission held that the agreement "is one which controls, regulates, prevents, and destroys competition . . . [and] is subject to our jurisdiction under Section 15 . . . ." 2 U.S.M.C. 453, 457.

Agreements 8745 and 8745-1, Purchase of Vessels "Alicia" and "Dorothy", 7 F.M.C. 199 (1962), involved in actuality one agreement for the sale of two vessels by one carrier to another coupled with a one year non-compete clause on the part of the seller. Prior to the hearing on the pending agreement, the Commission

invited the views and comments of the Department of Justice. In response, the head of the Antitrust Division advised the Commission that there was no objection to Commission approval of the agreement. The agreement was found to be one "which regulates, prevents and destroys competition [and] is required by section 15 of the Act to be filed immediately with the Commission, as it was." 7 F.M.C. 199, 200. The agreement was approved by the Commission.

Agreement No. 8555 Between Isbrandtsen Steamship Company, Inc., Isbrandtsen Company, Inc., and American Export Lines, Inc., 7 F.M.C. 125 (1962), was an agreement effecting the transfer of all the assets of one carrier to another, the transferor agreeing not to compete. The Commission held that the agreement was subject to Section 15 and added:

> We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify "*every* agreement . . . controlling, regulating, preventing, or destroying competition." To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*. We are not authorized anywise, with respect to particular types of agreements (or anything else), to emasculate the Act to the detriment of the public interest, and this (al-

> though it might make our task substantially easier) we will not do. [Emphasis in original] 7 F.M.C. 125, 128, n.5.

Opponents of Commission jurisdiction advanced the argument that steamship lines are not required to file such agreements with the Commission, which the Commission stated would keep

> this regulatory agency in the dark about such situations, even if they are wholly repugnant to the Shipping Act and the public interest. We hold, to the contrary, that such agreements must be filed with the Commission, and the Commission fully informed. 7 F.M.C. 125, 131.

An important case in the annals of the Commission's rulings on Section 15 agreements was *Agreement for Consolidations or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 F.M.C. 53 (1967), reversed on other grounds *Matson Navigation Co.* v. *F.M.C.*, 405 F.2d 796, in which the Commission met the argument that it had jurisdiction only over agreements that could be continually supervised and since a merger agreement was not amenable to continuing supervision, it was not subject to the Commission's jurisdiction. The Commission answered that "section 15 provides for continuing supervision where it is called for—but we do not concede that the provision for continuing supervision of agreements requiring it limits our authority to only those agreements." 11 F.M.C. 53, 60-61.

The court below distinguishes this last agreement on

the fact that it was an agreement to merge or consolidate and not an agreement for the acquisition of assets. "The Commission's finding in *Matson* [sic] that it had jurisdiction under Section 15, then, is not determinative of the issue in the case here, even assuming that the FMC correctly determined its jurisdiction. . . ." (P.A. 40, n.39) Curiously, however, the court later concludes that this Commission lacks jurisdiction not only with respect to acquisition agreements but " 'mergers' . . . and like ilk. . . ." as well. (P.A. 47)

Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc., and W.R. Grace & Co., and Sale and Transfer of Prudential Assets and Obligations to Grace Line, Inc., 13 F.M.C. 156 (1969) was an agreement providing for the purchase by Prudential Lines, Inc. of all the outstanding capital stock of Grace Lines, Inc. and the sale of Prudential's operating assets to Grace Line. The Commission's jurisdiction was undisputed and the agreement was approved.

Agreement No. 9905, 14 F.M.C. 163 (1970), providing for the purchase of four vessels by American Export Isbrandtsen Lines, Inc. from Moore-McCormick Lines, Inc., was submitted to the Commission pursuant to Section 15 and was subsequently approved.

Finally, the most recent agreement of merger or acquisition before the Commission is the subject of *Agreement of Merger, No. 9827-1*, currently pending decision. It was this agreement, in a different form, which was held to be outside the Commission's scope of jurisdiction in the *R. J. Reynolds Tobacco Co.* case. See n.8 *supra*. at 5.

In addition to the foregoing docketed proceedings,

there are numerous agreements of acquisition, merger, or consolidation on file with the Commission for which no formal proceedings were necessary.

The Federal Maritime Commission has endeavored to carry out the mandates of both Congress and this Court which require that Section 15 be given broad coverage. Such a construction demands that agreements of merger, acquisition, and consolidation be submitted to this Commission for approval or disapproval pursuant to Section 15.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below be reversed.

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EDWARD G. GRUIS,
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JANUARY 26, 1973

I authorize the filing of the foregoing Brief.

ERWIN N. GRISWOLD
Solicitor General

EXHIBIT A

UNITED STATES MARITIME COMMISSION
WASHINGTON 25, D. C.

Sep 29 1949

The Honorable
Herbert R. O'Conor
Chairman, Subcommittee to
Consider H. R. 2734
United States Senate

My dear Senator O'Conor:

The attention of the Maritime Commission has been called to the provisions of the bill H. R. 2734, now under consideration by your subcommittee. Among other things, this bill would amend section 7 of the Act of October 15, 1914 (the Clayton Act), to prohibit certain corporations from acquiring the assets of competing corporations where in any section of the country the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly. The bill would also add a new paragraph to section 7 to provide that nothing contained in such section shall apply to transactions duly consummated pursuant to authority given by certain specified Federal commissions and agencies under any statutory provision vesting such power in such commission or agency.

Section 15 of the Shipping Act, 1916, as amended, which is administered by the Maritime Commission, requires every common carrier by water or other per-

son subject to the Act to file with the Commission any agreement with another such carrier or other person subject to the Act if such agreement, among other things, is one "controlling, regulating, preventing or destroying competition." The Commission has authority to disapprove any such agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act." Agreements approved by the Commission under this provision are "excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 to 79, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the government, and for other purposes', and amendments and Acts supplementary thereto" (commonly referred to as anti-trust laws). A copy of the pertinent provisions of section 15 of the Shipping Act is submitted herewith for your reference.

It does not appear that the provisions of H. R. 2734 are intended directly or indirectly to affect the above-quoted exemption from the Anti-Trust Laws provided in section 15 of the Shipping Act. However, in view of the fact that the bill contains provisions specifically recognizing an exemption in respect of transactions approved by specified agencies under statutory authority, the Commission believes that the section in question

should be amended to exempt from section 7 of the Clayton Act, as proposed to be amended by the bill, the transactions approved pursuant to authority given by the Maritime Commission under statutory authority such as the aforesaid section 15 of the Shipping Act, 1916. This would avoid undesirable controversy which is likely to arise from any contention that the failure to include the Maritime Commission among the agencies specifically mentioned makes agreements approved by the Commission under section 15 of the Shipping Act of 1916, or other transactions approved under statutory authority of the Maritime Commission, subject to the provisions of section 7 of the Clayton Act.

Sincerely yours,

/s/ GRENVILLE MELLEN
Grenville Mellen
Vice Chairman

Enclosure

☆ U.S. Government Printing Office: 1973—493-705/48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, *Petitioner*

v.

SEATRAIN LINES, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY OF SEATRAIN LINES, INC. TO MOTION OF R. J. REYNOLDS TOBACCO COMPANY TO FILE BRIEF AS AMICUS CURIAE.

Seatrain Lines, Inc. objects to the motion of R.J. Reynolds Tobacco Company (Reynolds) to file an *amicus curiae* brief and respectfully requests that said motion be denied.

Under the Rules of the Supreme Court of the United States, the purpose of an *amicus curiae* brief is to present facts or questions of law related to the issues being reviewed which the *amicus curiae* believes will be inadequately presented by the parties (Rule 42(3)). The motion of Reynolds makes it clear that its purpose in filing as an *amicus curiae* is to argue matters beyond

the issues on review. Reynolds states that it desires to argue that an agreement with which it is involved is distinguishable from the agreement being reviewed in the instant proceeding. Alternatively, Reynolds wants to argue that this Court should decide in Reynold's favor the issue presented in the pending petition for a writ of certiorari in *R.J. Reynolds Tobacco Co., et al.* v. *United States and FMC,* No. 71-157 which is not an issue in the present proceeding. This announced purpose by Reynolds clearly does not comply with Rule 42(3) because Reynolds seeks to argue on issues not properly before the Court in the present proceeding and which are not necessary for argument or presentation at this time.

The proposed *amicus curiae* filing by Reynolds would unduly broaden the proceeding before the Court and would require the parties to address issues completely outside the ambit of the issues on review in this proceeding.

In view of this lack of compliance with Rule 42, and the clearly unnecessary broadening of issues involved in the *amicus curiae* presentation, we respectfully object to the filing of the *amicus curiae* brief by Reynolds and respectfully request that the Reynold's motion to file such brief be denied.

Respectfully submitted,

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February 16, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, Petitioner,

v.

SEATRAIN LINES, INC.; PACIFIC FAR EAST LINE, INC.; THE OCEANIC STEAMSHIP COMPANY; and UNITED STATES OF AMERICA, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS PACIFIC FAR EAST LINE, INC., and THE OCEANIC STEAMSHIP COMPANY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17)[1] is reported *sub nom. Seatrain Lines, Inc. v. Federal Mari-*

[1] "Pet. App." refers to pages in the appendix to the Commission's petition for a writ of certiorari. "App." references are to pages of the single appendix filed by petitioner pursuant to Rules 26 and 36.

time Commission at 460 F.2d 932. The opinions of the Federal Maritime Commission (Pet. App. 51 and Pet. App. 55) are not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 23, 1972 (App. 70). The petition for a writ of certiorari was filed on June 20, 1972 and granted on December 11, 1972 (34 L.Ed. 2d 510). The jurisdiction of this Court rests on 28 U.S.C. §§1254(1) and 2350.

QUESTION PRESENTED

Under Section 15 of the Shipping Act, 1916, Federal Maritime Commission approval of certain anticompetitive agreements among common carriers by water subject to the Act excepts those agreements from the provisions of the antitrust laws. The question presented is whether the court of appeals correctly held that Section 15 does not empower the Commission to approve and thereby immunize from the antitrust laws a contract by one such carrier to acquire the assets of another.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. §814 (1970), is set out in pertinent part at pp. 2 and 3 of petitioner's brief.

STATEMENT

1. *Background of the Agreement in Suit.*

This case has its genesis in an October 1970 contract of sale between Pacific Far East Line, Inc. ("PFEL") and The Oceanic Steamship Company ("Oceanic"), a wholly owned subsidiary of Matson Navigation Company ("Matson"). Under that contract (set out in pertinent part at App. 2) PFEL acquired Oceanic's four ships and its interest in two "full containerships"[2] under construction, together with personnel and shoreside equipment related to the vessels' operations. The contract neither terminated Oceanic's corporate existence nor required that carrier or its parent to refrain or withdraw from competition with PFEL in any way (Pet. App. 53).

PFEL and Oceanic were not competitors, although both were common carriers by water in the foreign commerce of the United States operating on routes in the Pacific. Both carriers were subsidized under the Merchant Marine Act, 1936,[3] and confined by law and their government subsidy contracts to operations on different trade routes established by the Secretary of Commerce: PFEL on Trade Route 29 (U. S. West Coast to the Far East) and Oceanic on Trade Route 27 (U. S. West Coast to Australia and New Zealand).[4] PFEL also maintained

[2] As distinguished from conventional freighters or "break-bulk" ships, full containerships are modern vessels designed to carry cargo stored in metal boxes of standard sizes in cells specially designed for the purpose. See, *Sea-Land Service, Inc. v. Connor*, 418 F.2d 1142 (D.C. Cir. 1969).

[3] 46 U.S.C. §1101 *et seq.*

[4] The Merchant Marine Act, 1936 (in 46 U.S.C. §§1120 and 1121) authorizes the Secretary of Commerce to designate routes "essential for the promotion, development, expansion, and mainte-

an unsubsidized operation from the West Coast to Guam with two vessels confined to that service by statute.[5] As subsidized operators neither carrier could serve any other trade route without government permission.

2. *Proceedings Before the Federal Maritime Commission.*

Under Section 15 of the Shipping Act, 1916, 46 U.S.C. §814, certain agreements between common carriers by water subject to the Act are unlawful unless first filed with and approved by the Federal Maritime Commission.[6] Commission approval of such agreements insulates them from the operation of the antitrust laws.[7] Contracts

nance of the foreign commerce of the United States . . . ." The government has entered into various operating-differential subsidy agreements "to meet foreign-flag competition and to promote the foreign commerce of the United States" on these trade routes as authorized by 46 U.S.C. §§1171(a) and 1173(a). Vessels operating under such agreements are restricted to the limits of the routes and services so determined to be essential. 46 U.S.C. §1173(a). See, generally, *Pacific Far East Line, Inc. v. United States*, 394 F.2d 990, 992-93 (Ct. Cl. 1968); *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568, 570-71, 582 (Ct. Cl. 1969).

[5]Act of December 14, 1967, P. L. No. 90-195, 81 Stat. 581, 1 U.S. Code Cong. & Ad. News 633 (1967). See S. Rep. No. 792, 90th Cong., 1st Sess. (1967), 2 U.S. Code Cong. & Ad. News 2172-73 (1967).

[6]This authority was initially conferred on the United States Shipping Board (39 Stat. 728, 733 (1916)), transferred to several other agencies over the years (see Executive Order No. 6166, §12 (1933); 49 Stat. 1985 (1936); and 64 Stat. 1273 (1950)); and now rests in the Commission, 75 Stat. 840 (1961). References to the Commission in this brief include those predecessor agencies where the context requires.

[7]Section 15 provides in pertinent part that: "Every agreement, modification or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto." 46 U.S.C. §814.

for the sale of ships and related assets by one ocean carrier to another are not among those expressly included in Section 15 as requiring such approval and entitled to that exemption.

As a matter of business expediency PFEL and Oceanic submitted the contract of sale to the Commission, but in doing so expressly informed the agency that "they had been advised by their counsel that the Contract of Sale does not require approval of the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act, 1916." (App. 33). The Commission disagreed,[8] designated the contract as "Agreement No. 9903," and published notice in the Federal Register that it had been filed "for approval pursuant to Section 15 of the Shipping Act, 1916." 35 F.R. 16114 (October 14, 1970).

Seatrain Lines, Inc. ("Seatrain"), which asserted that it was "considering entry" into the West Coast–Far East and South Pacific trades, objected to the agreement and requested a hearing (App. 35). PFEL and Oceanic opposed the request on the ground that Seatrain lacked the requisite interest, preserving as well their basic position that in any event the contract of sale "is not subject to Section 15." (App. 52, n. 1). The Commission found, *inter alia*, that Seatrain's protest was based on "mere speculation," rejected the demand for hearing and approved the agreement on October 27, 1970; on December

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[8]The Commission divided on the issue. Commissioner Day remains of the view that "the Commission is without jurisdiction over [ship sale and merger] agreements." See *Agreement 9827 Between United States Lines, Inc., and Sea-Land Service, Inc. et al.*, slip opinion p. 2, (F.M.C. Docket Nos. 69-56 and 70-51, February 12, 1973.)

8, 1970 the Commission denied Seatrain's motion for reconsideration (Pet. App. 51, 57).[9]

3. *Proceedings in the Court of Appeals.*

On February 8, 1971 Seatrain petitioned the court below for direct review of the Commission's order under the Hobbs Act,[10] which makes the United States a respondent in such proceedings.[11] PFEL and Oceanic intervened as respondents and the Department of Justice appeared for the United States in that action. These three respondents contended, *inter alia*, that Section 15 of the Shipping Act did not clothe the Commission with authority to approve and immunize from the antitrust laws contracts for the sale of assets between ocean carriers.

The District of Columbia Circuit agreed, following Judge Garth's similar holding in *United States v. R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971), and distinguishing the contrary result reached by a divided court in *Matson Navigation Co. v. F.M.C.*, 405 F.2d 796 (9th Cir. 1968). In a decision rendered March 23, 1972, the court of appeals held that "both the language and context of Section 15 itself and the legislative history accompanying it demonstrate" that such agreements are not covered by the section, 460 F.2d

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[9]The contract of sale was also contingent on certain approvals by the Maritime Administration of the Department of Commerce, which were obtained. See, 12 Pike & Fischer Ship. Reg. Rep. 218 (Jan. 15, 1971).

[10]Now 28 U.S.C. §§2341 *ff.*

[11]28 U.S.C. §2344.

932, 934 (Pet. App. 20-21). The court below vacated the Commission's approval of Agreement No. 9903 and directed the Commission to remove the agreement from its docket (Pet. App. 50). The Commission then petitioned this Court to review the D.C. Circuit's decision, raising only the question of its jurisdiction under Section 15 (Pet. 2); no cross-petitions were filed.

SUMMARY OF ARGUMENT

I.

Section 15 of the Shipping Act, 1916, exempts certain kinds of agreements among carriers subject to the statute from judicial scrutiny under the antitrust laws if they receive the prior approval of the Federal Maritime Commission. 46 U.S.C. §814. Contracts for the sale of one ocean carrier's assets to another are not among those specified in Section 15 as requiring approval and entitled to such immunization. The court below correctly held that the section contemplates only limited antitrust exemption for ongoing cooperative working agreements among competing ocean carriers which are amenable to the supervision of the Commission and does not reach permanent, one-time transactions, like the sale of one carrier's fleet to another, which are difficult if not impossible to unscramble at a later date.

II.

The Commission's principal attack upon the decision below purports to be based on its reading of the "plain meaning" of Section 15. When analyzed, however, its real argument is that a ship sale contract or merger arrangement is one potentially "destroying competition" and therefore within Section 15 by implication. The lower

court's rejection of this so-called "plain meaning" approach is on very sound ground. Congress has taken the identical language from Section 15 upon which the Commission relies and used it in what is now the Federal Aviation Act of 1958 in a manner confirming that it refers only to ongoing working and pooling agreements and not to asset acquisitions or mergers. See 49 U.S.C. §§1378, 1382, and 1384. The Commission's contrary view does not merit judicial deference; it is of recent vintage and by no means a contemporaneous administrative construction. Indeed, Commission practice until recent years has always been to refuse jurisdiction over ship sale contracts unless they were coupled with some form of ongoing anticompetitive working agreement between the parties such as one to refrain from competition. The Commission's position also flies in the face of the accepted principle that repeal of the antitrust laws by implication are not favored. This Court's earlier decision in *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968), does not require a contrary result. The question of merger jurisdiction under Section 15 was not before the Court in that case and the decision itself makes plain that not all agreements which might be read into Section 15 are in fact within that provision.

III.

The legislative history confirms the court of appeals' reading of Section 15. The "Alexander Report" upon which it was based was the result of a Congressional investigation which sought not to immunize consolidations and mergers, but rather to bring anticompetitive working arrangements and conference agreements in the shipping industry out into the open and under government regulation as a means, among other things, of discouraging such mergers and consolidations.

IV.

The Commission's reliance on a 1950 amendment to Section 7 of the Clayton Act as confirming its jurisdiction over asset acquisitions was properly rejected as a bootstrap attempt to gain additional authority where none was intended to be conveyed. See *California v. Federal Power Commission*, 369 U.S. 482, 486 (1962). After more than 50 years of operation, because Shipping Act and antitrust policies are not identical there is no reason now why the Commission's jurisdiction must be expanded to cover mergers and acquisitions in order to enable it to do its job properly. At all events, that policy argument should be addressed to the Congress, which we note has declined to grant other regulatory agencies authority to immunize asset acquisitions and mergers from the antitrust laws (See e.g. *California v. Federal Power Commission, supra,* and, even where it has done so, has insisted upon the application of different standards to such transactions than govern anticompetitive working agreements. *E.g.*, 49 U.S.C. §§1378 and 1382.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY CONSTRUED SECTION 15 OF THE SHIPPING ACT, 1916, AS AUTHORIZING ANTITRUST IMMUNITY ONLY TO ONGOING ARRANGEMENTS AMENABLE TO COMMISSION SUPERVISION.

Under Section 15 of the Shipping Act, 1916, certain agreements must have Commission approval to be lawful; such agreements when approved are excepted from the antitrust laws. The provision directs there be filed for

Commission approval every agreement between parties subject to the Act (46 U.S.C. §814):

[1] "fixing or regulating transportation rates or fares";

[2] "giving or receiving special rates, accommodations, or other special privileges or advantages";

[3] "controlling, regulating, preventing, or destroying competition";

[4] "pooling or apportioning earnings, losses, or traffic";

[5] "allotting ports or restricting or otherwise regulating the number and character of sailings between ports";

[6] "limiting or regulating in any way the volume or character of freight or passenger traffic to be carried"; or

[7] "in any manner providing for an exclusive, preferential, or cooperative working arrangement."

The arrangements Congress made subject to Commission approval—and for which it authorized antitrust exemption—are thus spelled out in detail in Section 15; conspicuous by their omission are references to contracts involving asset acquisitions, such as the sale of ships involved here, and mergers. It is the substance of the Commission's position that these are included by implication. It contends that PFEL's contract to acquire Oceanic's assets was an agreement which could "quite literally" eliminate or prevent competition between those ocean carriers and, therefore, Commission jurisdiction to approve that contract—and to immunize it from the antitrust laws—"must follow from the plain meaning of the language of Section 15 [Item 3]." (Brief, p. 7).

The court of appeals rejected that "plain meaning" argument on the ground that Section 15 is directed at a discrete problem: the control of ongoing anticompetitive working arrangements among water carriers amenable to Commission supervision. The court held that single transactions of a permanent nature such as the sale of all assets—which would be difficult if not impossible to undo or modify at a later date[12] —were not intended to be governed by the Section and not entitled to receive antitrust immunity. The D. C. Circuit was led to this conclusion by the structure of the Act, its legislative history, and its understanding of the "fundamental import" of the nation's antitrust policies. We are in complete accord with the court of appeals' position expressed in its opinion and, in the interest of brevity, adopt rather than restate those arguments. We address ourselves here directly to the Commission's attempts to refute them.

II.

THE "PLAIN MEANING" OF SECTION 15 DOES NOT MAKE ASSET ACQUISITIONS OR MERGERS SUBJECT TO THE COMMISSION'S JURISDICTION.

The Commission's basic position is that the "plain meaning" of Section 15 gives it jurisdiction over ship acquisitions and mergers. It concedes, however, as indeed it must, that "acquisition, merger or consolidation agreements are not specifically enumerated in Section 15." (Brief, p. 14). The Commission's contentions thus boil down to the argument that its authority is implied in the statutory language referring to "agreements control-

[12] See, e.g., *California v. Federal Power Commission*, 369 U.S. 482, 488-489 (1962).

ling, regulating, preventing or destroying competition." (Clause [3], *supra*). The superficial appeal of this argument does not withstand a close analysis.

A. Congress has elsewhere used the language the Commission relies on in a manner contrary to the Commission's understanding.

There are a number of persuasive reasons why that "plain meaning" argument lacks merit, not the least of which is that Congress used the very language the Commission relies on as a model in other legislation which makes it abundantly clear that the phrase in question does not encompass asset acquisitions or mergers. Title IV of the Civil Aeronautics Act of 1938, re-enacted without substantive change as Title IV of the Federal Aviation Act of 1958, 49 U.S.C. §§1371 *et seq.*,[13] provides for air carrier regulation in a manner parallel to that governing ocean carriers under the Shipping Act, 1916. Section 412, now 49 U.S.C. §1382,[14] requires Civil Aeronautics Board approval of

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[13] See *Pan American World Airways v. United States*, 371 U.S. 296, 300-301 (1963), and H. R. Rep. No. 2360, 85th Cong., 2nd Sess. (1958), 2 U.S. Code Cong. & Ad. News 3741, 3755 (1958).

[14] Section 412, 49 U.S.C. §1382, provides (emphasis added):

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carriers and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, *or for control-*

specified anticompetitive arrangements between air carriers and was explicitly modelled on Section 15 of the Shipping Act. *McManus v. C.A.B.*, 286 F.2d 414, 419 (D.C. Cir. 1961), *certiorari denied*, 366 U.S. 928.[15] In language virtually identical to that of Section 15 of the Shipping Act, 1916, which the Commission relies on here, Section 412 requires air carriers to file for Board approval "every contract or agreement [among air carriers] . . . controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition, * * *." As is the case with the Shipping Act, Board approval of such agreements carries with it immunity from the antitrust laws. 49 U.S.C. §1384.

Congress did not, however, intend the quoted language of Section 412 to apply to transactions in the nature of asset acquisitions or mergers. Rather, it provided explicitly for such transactions in an entirely separate provision of the same Act, Section 408, now 49 U.S.C.

(footnote 14 continued)

ling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

[15] See, also, *ATC Agency Resolution Investigation*, 29 C.A.B. 258, 259, 307 (1959), the underlying Board decision.

§1378.[16] See *Pan American Airways v. United States*, 371 U.S. 296, 301-304 (1963). Section 408—which has no Shipping Act counterpart—provides in pertinent part that: "(a) it shall be unlawful unless approved by order of the Board as provided in this section— * * * (2) For any air carrier . . . to purchase, lease or contract to operate the properties, or any substantial part thereof, of any air

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[16] Section 408, 49 U.S.C. §1378, provides in pertinent part:

(a) it shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier; . . . .

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, ... Unless, after . . . hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: . . . .

carrier, * * *." If the language in Section 412 taken from Section 15 of the Shipping Act, relating to filing and approval of agreements "controlling, regulating, preventing or otherwise eliminating . . . competition," was meant to embrace asset acquisitions and mergers, then Sections 408 would be surplusage. [17] This is a result not lightly attributed to Congress. *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971).

We recognize that the actions of a later Congress are not necessarily controlling respecting the intentions of an earlier one. The Civil Aeronautics and Shipping Acts, however, represent legislative attempts to resolve compar-

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[17]The Commission attempts to distinguish the separate provisions in the Civil Aeronautics Act, treating acquisitions differently than pooling agreements and other ongoing arrangements, on the basis of a *dictum* in an early Board decision citing both Sections 408 and 412 in an acquisition case. *Acquisition of Marquette by TWA*, 2 C.A.B. 1, 4 (1940). (Brief, p. 17). Reliance on that case is misplaced: (1) the question was not before the Board in *Marquette*, (2) the Board quoted only Section 408 (*i.e.*, the merger section) language as the basis for its substantive jurisdiction over the acquisition, and (3) the agency's *dictum* (if it be that) conflicts with this Court's own analysis of the Civil Aeronautics Act in *Pan American World Airways v. United States*, 371 U.S. 296, 304 (1963). Moreover, the Commission makes no attempt to explain why Congress would want the same acquisition of assets transaction covered by two separate provisions of the Act each applying different standards for approval. Compare Section 408(b), 49 U.S.C. §1378(b), which directs that the Board "shall not approve any consolidation, merger, purchase [etc.] . . . which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not party to the consolidation, merger, purchase [etc.] . . .", with Section 412(b), 49 U.S.C. §1382(b), relating to "pooling and other agreements" which provides that "the Board shall by order disapprove any such contract or agreement . . . that it finds to be adverse to the public interest, or in violation of this chapter, ..."

able problems facing related industries. In this context it is appropriate to consider subsequent legislation in interpreting related prior enactments. *Great Northern R. Co. v. United States*, 315 U.S. 262, 277 (1942). Congress used Section 15's language in the Civil Aeronautics Act in a manner directly inconsistent with the Commission's reading of that same language. At the very least, this makes dubious the "plain meaning" of Section 15 which the Commission here urges on the Court.

B. The Commission's discovery of the "plain meaning" of Section 15 of the Shipping Act, 1916, is very recent and merits no judicial deference.

Nor is this a case where deference should be accorded an agency's reading of its own enabling legislation because its administrators participated in the drafting and directly made their views known to Congress in the committee hearings. On the contrary, as the Court observed in *Zuber v. Allen*, 396 U.S. 168, 193 (1969), "[t]hese props that serve to support a disputable administrative construction are absent here."

Far from being a "contemporaneous construction," the Commission's perception of the "plain meaning" of Section 15 is of recent origin. Sales of ships are common in the maritime industry. Yet, until this case, to the best of our knowledge of Commission practice extending back more than 40 years, the Commission did not require approval of such agreements where they did not limit competition between the parties.[18] The absence of a

[18] Until the recent cases, all the reported Commission decisions involved some restrictive arrangement in addition to the ship sales. See *New York and Porto Rico SS Co.–Waterman SS Corp. Agreement*, 2 USMC 453 (1940) (sale of good will and agreement

jurisdictional claim over agreements of this type is especially significant. If they are within Section 15, they must immediately be filed with the Commission for a failure to file would itself violate Section 15, *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968), a violation the Commission could proceed against on its own motion. *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 484, 486 (1932).[19] The Commission's half century of silence in the face of innumerable unfiled asset acquisition agreements confirms that its jurisdiction over ship sales contracts like the one at bar is far from "plain" under Section 15.[19a]

not to compete for ten years); Agreements 8745 and 8745-1, *Purchase of Vessels "Alicia" and "Dorothy"*, 7 FMC 199 (1962) (sale of two vessels and agreement not to compete for one year); *Agreement No. 8555 between Isbrandtsen Steamship, Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc.*, 7 FMC 125 (1962) (sale of entire business including 14 vessels and agreement not to compete); *Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 FMC 53 (1967) (merger agreement among competing carriers), rev'd on other grounds, *Matson Navigation Co. v. FMC*, 405 F.2d 796 (9th Cir. 1968); *Agreement No. 9905*, 11 Pike & Fischer Ship. Reg. Rep. 1090 (1970) (sale of four vessels to competing carrier); *Agreement No. 9827 Between United States Lines, Inc. and Sea-Land Service, Inc.* (and Walter Kidde & Co., Inc., and R. J. Reynolds Tobacco Co., Guarantors), 11 Pike & Fischer Ship. Reg. Rep. 759 (1970) (20 year charter of 16 vessels between competing carriers); *cf.*, Agreement No. 9810–*Prudential Lines and Grace Line*, 11 Pike & Fischer, Ship. Reg. Rep. 284 (1969) (merger agreement between non-competing carriers).

[19]See also, *Unapproved Section 15 Agreements–South African Trade*, 7 F.M.C. 159, 190-92 (1962); *Unapproved Section 15 Agreement–Coal to Japan/Korea*, 7 F.M.C. 295, 302 (1962).

[19a]Moreover, Section 15 applies with equal force to transactions between foreign-flag carriers which serve the United States. *Alleged Rebate of Mitsui S.S. Co.*, 7 F.M.C. 248, 253 (1962); *Armament Deppe, S.A. v. United States*, 399 F.2d 794 (5th Cir. 1968),

C. Acceptance of the Commission's construction of Section 15 would repeal the antitrust laws by implication.

Another sound reason why the Commission's "plain meaning" approach to Section 15 was properly rejected by the court below is the substantive result its acceptance would engender. To hold that the Commission has jurisdiction over asset acquisitions or mergers is to decide that Congress intended to grant antitrust immunity to transactions not otherwise exempt. *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 242-243 (1968). The Court's decisions have long taught, however, that a congressional purpose to grant such immunity must be explicit. *E.g., United States v. Borden Co.*, 308 U.S. 188, 201 (1939). This is judicial recognition of the "fundamental" role which the antitrust laws play in our economy, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 219 (1966), and it requires that exemptions from the antitrust laws be strictly construed. *United States v. McKesson & Robbins*, 351 U.S. 305, 316 (1956).

This Court has explored the limits of Section 15 before. In so doing it has taken note of the fact that "[t]he Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress

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certiorari denied, 393 U.S. 1094. Ship sales and mergers are at least as common among foreign carriers as domestic. The Commission however, expressly disclaims Section 15 jurisdiction over mergers between foreign-flag carriers but relies on the identical provision to assert authority over foreign-flag agreements and sailing arrangements. Compare *Merger,–American Mail Line and Pacific Far East Line*, 11 F.M.C. 53, 57 (1967) with *City of Portland, Oregon v. F.M.C.*, 433 F.2d 502 (D.C. Cir. 1970).

which enacted the Clayton Act." *Carnation Co. v. Pacific Westbound Conference, supra,* 383 U.S. at 218 (1966). And with respect to the extent to which industry transactions were to be excepted from the Sherman and Clayton Acts, the Court concluded that (*Id.* at 218-220):

> . . . the §15 exemption clearly demonstrates that those who drafted the Shipping Act during the next Congress decided not to give the industry complete antitrust immunity. Since the problem of the application of the antitrust laws to the shipping industry was one of the focal points of the entire inquiry, the exemption provision could not have been a casual afterthought. The language of that provision must have been selected as a matter of deliberate choice . . . .

With all deference to the Commission, we submit that the "Congress which enacted the Clayton Act" and selected "the language of [Section 15] as a matter of deliberate choice," was unlikely to endow a new administrative agency with unprecedented authority to exempt acquisition agreements and mergers from the antitrust laws as "a casual afterthought", *i.e.*, by implication without express mention in the statute. In the circumstances, the court of appeals drew the correct conclusion: "on the face of the statute, the language of Section 15 does not vest the Commission with jurisdiction over the type of agreement here at issue—the acquisition of all the assets of one common carrier by water by another common carrier." 460 F.2d at 938.[20]

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[20] We fail to follow the Commission's reasoning in attempting to distinguish the positions of the Interstate Commerce Commission and the Civil Aeronautics Board, which have jurisdiction over asset acquisitions and mergers. (Brief, pp. 16-17). As this Court's decisions have repeatedly noted, each of those agencies derives that authority from express statutory grants. See, *e.g.*, *Hughes Tool Co.*

D. *Volkswagenwerk v. F.M.C.* does not compel acceptance of the Commission's understanding of the reach of Section 15.

The Commission's conception of Section 15 apparently stems from a belief that it is compelled by the Court's decision in *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968).[21] We respectfully suggest that this is not the case. To begin with, whether asset acquisitions and mergers were within the Commission's jurisdiction under Section 15 was neither an issue in nor decided by *Volkswagenwerk*. That case held an agreement among parties subject to the Shipping Act assessing contributions for a Fund to mitigate the effects of automation on employees was subject to the Commission's approval under Section 15. The Commission itself had conceded in its own decision, however, that the procedure decided upon by the affected parties for raising the Fund was "a cooperative working arrangement" within the express language of Section 15 (390 U.S. at 271), but had declined jurisdiction on the extra-statutory ground that the arrangement did not "affect competition" (*id.* at 273). It was this conclusion by the Commission that the Court held "does not square with the structure of the statute." (*id.* at 275).

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v. Trans World Air Lines, Inc., ____ U.S. ____, 34 L. Ed. 2d 577, 582 (1972), and *Pan American World Airways v. United States, supra*, (C.A.B.); *Denver & R.G.W. R.R. Co. v. United States*, 387 U.S. 485, 913 (1967) (I.C.C.).

[21] A similar conclusion was reached by the majority in *Matson Navigation Company v. F.M.C.*, 405 F.2d 796 (9th Cir. 1968), but rejected by the dissenting judge (*id.* at 802), by the district court in *United States v. R. J. Reynolds Tobacco Company*, 325 F. Supp. 656, 661 (D.N.J. 1971), and by the court below, 460 F. Supp. at 957.

To be sure, this Court did say in *Volkswagenwerk* that the Commission had taken "an extremely narrow view of a statute that uses expansive language." (390 U.S. at 273). But that statement is to be understood in relationship to the argument advanced by the Commission in that case that it could limit its jurisdiction over subject matter Congress explicitly made subject to its authority in the Act. It does not follow, however, that because the Commission was off course in *Volkswagenwerk* a 180 degree turn was required. The Court itself recognized in that case that not all agreements which conceivably could be read as within Section 15 are in fact embraced by the provision. Thus the Court took pains in the *Volkswagenwerk* decision to disassociate itself from any suggestion that collective bargaining agreements in the maritime industry might be subject to the Commission's jurisdiction under Section 15, stating (390 U.S. at 278):

> Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity.[22]

An agreement subject to Section 15 and not filed for Commission approval would, of course, be invalid. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

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[22] The Commission, however, still insists it has Section 15 jurisdiction over collective bargaining agreements at least to some degree. See *Boston Shipping Assn. v. United States*, ____ F.2d ___, 8 Pike & Fischer Ship. Reg. Rep. 20,828 (1st Cir. 1972); on remand to the Commission *sub nom. United Stevedoring Corp. v. Boston Shipping Assn.*, 13 Pike & Fisher Ship. Reg. Rep. 257 (F.M.C. 1972).

Asset acquisitions and mergers are on a similar footing. Like the relations between management and labor, they involve basic national policies transcending the interests of any single industry. See, *Carnation Co. v. Pacific Westbound Conference, supra*; *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. McKesson & Robbins, supra*; *Schroegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951); *United States v. Borden Co., supra.* Particularly in light of the Court's observations in *Carnation Co.* that the Congressional draftsmen of Section 15 only "wanted to give the shipping industry a limited antitrust exemption" (383 U.S. at 219-20), the court below very properly declined to construe *Volkswagenwerk* as abandoning, *sub silentio*, the carefully considered position which this Court reiterated in the cases cited against implying exceptions to the antitrust laws. Whether asset acquisitions or mergers fall within Section 15 was simply not before this Court in *Volkswagenwerk*. Not unexpectedly, the Court made no attempt to discuss—much less distinguish—the relevant cases and the fundamental antitrust principles for which they stand.

In short, we submit that the language of Section 15 relied on by the Commission can not fairly be understood to cover asset acquisitions and mergers. Even assuming *arguendo* that the words can be stretched to cover the Commission's reading of them, "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers'." *Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612, 619 (1967), quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). As we now show, the court below was equally correct in concluding that the legislative history of Section 15 does not support the Commission's position.

III.

THE LEGISLATIVE HISTORY OF SECTION 15 CONFIRMS THAT IT WAS DIRECTED AT REGULARIZING ONGOING ANTICOMPETITIVE AGREEMENTS IN THE SHIPPING INDUSTRY AND NOT IMMUNIZING ASSET ACQUISITIONS OR CONSOLIDATIONS.

The legislative history of Section 15 does not support the contention that the provision was intended to give the Commission jurisdiction over ship acquisitions or consolidations of lines. The Court has previously noted that "[t]he genesis of the Shipping Act was the 'Alexander Report'[23] in 1914," and that the Act was intended to carry out the recommendations of that Report.[24] Prepared under the supervision of Congressman J.W. Alexander, then chairman of the House Committee on Merchant Marine and Fisheries, it encompassed the results of an "exhaustive inquiry" into anticompetitive practices prevalent in the maritime industry at the time. The hearings were far-ranging, but the Committee's focus of interest is clearly illustrated by its "Recommendations Relating to Water Carriers Engaged in the Foreign Trade," (Alexander Report, p. 415 *et seq.*, and reproduced in its entirety as an appendix to this brief, *infra*, pp. 1a-10a):

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[23] House Committee on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. R. Doc. No. 605, 63rd Cong., 2nd Sess., Vol. 4 (1914) [hereinafter referred to as the Alexander Report].

[24] *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 488 (1958); *Carnation Co. v. Pacific Westbound Conference, supra*, 383 U.S. at 218-220; *Volkswagenwerk v. F.M.C., supra*, 390 U.S. at 276.

The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report. (For a full classification of these agreements see pp. 281 to 295 of the report.) The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line representatives and the exporting and importing interests of the United States. (For a full classification of the advantages and disadvantages see pp. 295 to 307 of the foregoing report.)

It was against this background of largely secret anticompetitive conference arrangements among the lines which were "almost universal practice" that the Committee framed its proposals (Alexander Report 415-416):

In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be

prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing abuses.

After describing the claimed advantages of the system as it operated under those agreements—regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, rate parity and equal treatment of shippers—the Committee decided in favor of allowing them to continue under government supervision (Alexander Report at 416, emphasis added):

> These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing arrangements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership.* Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.

The Alexander Committee was focusing on the problems inherent in ongoing arrangements among independent steamship companies. It recognized that circumstances did not justify a flat prohibition against such arrangements, for it appreciated that the result would be consolidation and merger of the existing lines. This, in the Committee's view, was an even more undesirable evil. One of the purposes of the Committee was to *discourage* the trend to such consolidations by authorizing and regularizing conference agreements which shielded the weaker lines. Alexander Report, p. 301. The Committee's solution, adopted by the Congress, was to make the conferences open and public and the restrictive agreements subject to government approval and supervision.[25] See *Carnation Co. v. Pacific Westbound Conference*, *supra*, 383 U.S. at 219.

The court below properly concluded that Congress' intent in enacting the Shipping Act, 1916, was "to tolerate only the minimum anti-competitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines by the method of government supervision of anticompetitive working arrangements". (460 F.2d at 940). In particular, the Court correctly noted that "the Committee had neither sought information nor had discussion on ship sale agreements." *Ibid*. Thus, there is

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[25] "The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as means of preserving to American exporters and importers of the advantages enumerated, and of preventing the abuses complained of." Alexander Report at 418.

no basis to read into Section 15 of the Act any implied intention on Congress' part to cover such agreements; they were not part of the problem. As for consolidations and mergers, as noted the Committee was attempting to discourage, not immunize, them. It had no reason to author a means by which they could be protected from the reach of the antitrust laws.

To be sure, the Committee did receive some data relating to consolidations among the lines. However, these were significant only in domestic commerce, not in the foreign trades. The Committee's own summaries of the anticompetitive practices it uncovered lists "control through acquisitions" only as a problem with respect to water carriers in the *domestic* trade (Alexander Report, p. 409), but makes no mention of any similar problem respecting the lines in American Foreign Trade (Alexander Report, pp. 281-314). Not unexpectedly, the Alexander Report made no recommendations regarding ship acquisitions or mergers in the foreign trades but did as to the domestic trades, limited, however, to proscribing railroad acquisitions of interstate barge lines. Alexander Report, p. 424.[26] Given the Committee's very limited recommendations respecting consolidations of domestic water carriers where such mergers were a problem, it simply does not follow that the Committee

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[26] "Recommendation Relating to Water Carriers Engaged in the Domestic Trade.... (12) That all interstate traffic on canals be placed under the supervision of the Interstate Commerce Commission; and that the railroads be prohibited in the future from acquiring, either directly or indirectly ownership and control of or interest in canals, or water lines, forwarding companies and other navigational facilities on such canals, when the same are used in interstate transportation."

wanted to vest blanket jurisdiction over these matters in the Commission respecting the foreign trades where they were not a problem and unmentioned in its "Recommendations." The excerpts from the Report cited by the Commission are not to the contrary.[27]

The conclusion that Congress did not intend to provide, *sub silentio*, for the antitrust immunization of acquisitions and mergers in enacting Section 15 is further supported by the terms used in the Alexander Report. For example, the Committee carefully distinguished among "(1) control through the acquisition of water lines or the ownership or accessories to the lines; (2) control through agreements or understandings; and (3) control through special practices." Alexander Report at 409. As the court of appeals noted (460 F.2d at 939), term "agreement" was not used in the Report to refer to asset acquisitions or consolidations.[28]

Moreover, it is to be recalled that the 62nd Congress, which authorized Chairman Alexander's investigation into the shipping industry in 1912, was the same one which enacted the Panama Canal Act later that year.

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[27] The material quoted by the Commission at the bottom of p. 29 of its brief is cited as a recommendation of the Committee. This is incorrect; it is from the "*Leading Recommendations of Witnesses for Proposed Legislation.*" Alexander Report, p. 307. Examination of the full quotation in context also makes clear that the witnesses were concerned with the "regulation of rates" and "conditions of water transportation," not ship acquisitions or mergers. *Id.* at 308.

[28] This is strikingly illustrated by completing the opening sentence of the paragraph from page 301 of the Alexander Report quoted by the Commission at pp. 28-29 of its brief (additional quotation italicized): "*In addition to combinations by agreement* there are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries."

Among other provisions, that Act amended the Interstate Commerce Act to make unlawful the control by railroads of common carriers by water using the Canal. 49 U.S.C. §5(14). And the Congress to which the Alexander Report was submitted in 1914 enacted the Clayton Act. Section 7 of that Act, as the court of appeals observed, "speaks in terms of the 'acquisition by one corporation of the [whole or any part of the] stock of another' and is directed at controlling corporate mergers." 460 F.2d at 937. The draftsmen of the Shipping Act were thus well aware of statutory language to preclude corporate consolidations. In the circumstances, the court below rightly concluded that (460 F.2d at 937, footnote omitted):

> It is highly unlikely, in view of this specific statutory treatment by Congress of the antitrust implications of acquisitions of corporate control, that Congress originally intended to exempt such acquisitions under Section 15 of the Shipping Act by making no specific reference to them but simply by including them under the rubric "agreement." On the contrary, the silence of Congress in Section 15 with respect to the subject of acquisition of control or ownership can only be taken to mean that Congress had no intention by the Shipping Act of 1916 to exempt such arrangements from the normal administration of the antitrust laws. The Federal Maritime Commission's attempt to derive a contrary affirmative intent on the part of Congress from its silence is not a favored method of statutory interpretation.

Because the court of appeals' opinion delves fully into the legislative history of Section 15, we have limited our own recapitulation to certain salient points. The establishment of negative proposition, however, *i.e.*, what Congress did not intend in enacting Section 15 over half a

century ago, is a difficult task. Congressional committee reports are normally drafted in terms of their positive goals and the Alexander Report is no exception. Reading excerpted passages does not always convey fully the direction of the authors' concerns. For this reason we have appended to this brief the entire section of the Report containing the "Recommendations of the Committee." (*Infra*, pp. 1a-10a). We respectfully submit that even a cursory review of that section will confirm that the Congressional authors of the Shipping Act did not intend to convey the jurisdiction over ship sales, asset acquisitions and mergers which the Commission here claims.

IV.

NEITHER POST ENACTMENT LEGISLATIVE ACTIONS NOR POLICY CONSIDERATIONS SUPPORT THE COMMISSION'S POSITION.

1. As it did in the court below, the Commission again asserts "post enactment consideration of Section 15 by Congress" supports its claimed authority over asset acquisitions and mergers in the shipping industry (Brief, p. 38). In particular, it relies on a 1950 amendment to Section 7 of the Clayton Act[29] expanding the scope of that Section to include asset acquisitions but exempting from its application transactions authorized by several agencies, including one of the Commission's predecessors. The Commission urges that this confirmed its merger jurisdiction under Section 15.

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[29] Act of December 29, 1950, c. 1184, 64 Stat. 1125-26, 15 U.S.C. §18.

The court below properly rejected the contention as no more than a "bootstrap attempt" to gain additional authority. As the court of appeals stated (460 F.2d at 941-942), the Commission was added to the list only as the result of its own request which acknowledged that the legislative proposal in question did not purport to affect any pre-existing authority. The correctness of that acknowledgement was promptly confirmed in the Senate report on the measure.[30] We note that a similar argument was rejected in *California v. Federal Power Commission*, 369 U.S. 482, 486 (1962):

> The words "transactions duly consummated pursuant to authority" given the Commission "under any statutory provision vesting such power" in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in §7 of the Clayton Act "... it is not intended that ... any ... agency" mentioned "shall be granted any authority or powers which it does not already possess." S.Rep.No. 1775, 81st Cong. 2d Sess., p. 7.

In short, here as in *Rainwater v. United States*, 356 U.S. 540, 543 (1958), "at most the ... amendment is merely an expression of how the ... Congress interpreted a statute passed by another Congress ... half a century

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[30] S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950), 2 U.S. Code Cong. Serv. 4300 (1950):

> ...(2) The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. *In making this addition, however, it is not intended that the Maritime Commission*, or, for that matter, any other agency included in this category, *shall be granted any authority or powers which it does not already possess.* [Emphasis added].

before. Under these circumstances such interpretation has very little, if any, significance."

2. Finally, the Commission's brief urges that antitrust and Shipping Act standards respecting asset acquisitions and mergers are not the same and therefore "Commission expertise must be called upon to reconcile the conflicting national policies." (Brief, p. 43). The extent of the Commission's "expertise" in this troublesome area is, to say the least, a matter of some debate even among the Commissioners.[31] Be that as it may, however, policy arguments of this sort are properly addressed to the Congress. Without immobilizing the industries concerned,

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[31] By a 3 to 2 vote on February 12, 1973 the Commission purported to approve the merger of the first and second largest containership operators in the world over the objections of the Department of Justice, competing United States-flag lines and others. *Agreement No. 9827 Between United States Lines, Inc., and Sea-Land Service, Inc., et al., FMC Docket Nos. 69-56 and 70-51.* Dissenting from that decision, F.M.C. Chairman Helen Bentley and Commissioner Ashton Barrett made the following comments (*inter alia*) pertinent to the Commission's "expertise" in this area:

> The majority would approve the "merger," but only upon the imposition of "conditions" which in their view are designed to "enable USL to remain a viable and independent company." In doing so, the majority ignores the lengthy record before it, misapplies the governing principles of the applicable law and ultimately proffers a "solution" that is at best exceedingly impractical and at worst totally unworkable.... To summarize our discussion, a close study of the record fails to lend any support to the action by the majority. The pronouncements contained in [*Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 (1968)] have been ignored by the majority who have fashioned an approval of the proposed merger agreement with "conditions" that are neither workable, justified by the record, or supported by realistic application [Slip Opinion at pp. 149-150, 156].

that body in its judgment has declined to grant other regulatory agencies authority to immunize transactions of this nature from the antitrust laws.[32] And even where it has granted this authority to agencies regulating other modes of transportation, it has insisted that asset acquisitions and mergers meet different standards for approval than ongoing cooperative working arrangements between competitors.[33] We respectfully suggest that the Commission's contentions regarding the appropriate manner for handling these problems are being presented before the wrong forum.[34]

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[32] See, *e.g.*, *California v. Federal Power Commission*, *supra*, 369 U.S. at 485-487.

[33] See, *e.g.*, the Federal Aviation Act of 1958, discussed *supra*, note 17 on page 15, *supra*.

[34] PFEL and Oceanic have not briefed the issue whether the Commission's approval of the contract of sale should be affirmed in the event the Court holds the Commission to have jurisdiction under Section 15, the issue not being presented here as no cross-petition raising it was filed. *Alaska Industrial Board v. Chugach Assn.*, 356 U.S. 320, 325 (1958). Should the Court reach the issue nonetheless, respondents believe the Commission's order should be affirmed and respectfully request opportunity to address the point.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 26, 1973

APPENDIX

ALEXANDER REPORT, pp. 415-424
"Recommendations of the Committee"

The resolution (H. R. 587) under which the Committee has been investigating shipping combinations directs the Committee "to report to the House all facts disclosed by said investigation, and what legislation, if any, it deems advisable in relation thereto." In compliance with the directions of the resolution relating to legislation, the Committee submits the following recommendations:

RECOMMENDATIONS RELATING TO WATER CARRIERS ENGAGED IN THE FOREIGN TRADE.

The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report. (For a full classification of these agreements see pp. 281 to 295 of the report.) The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line representatives and the exporting and importing interests of the United States. (For a full classification of the advantages and disadvantages see pp. 295 to 307 of the foregoing report.)

In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing

disadvantages and abuses. It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. (A classification of the advantages claimed as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)

These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place

American exporters at a disadvantage in many markets as compared with their foreign competitors.

Steamship line representatives, as well as the patrons of the lines, were almost a unit in emphasizing to the Committee the importance and necessity of the aforementioned advantages of agreements and conferences, and in asserting that these advantages can only be effected by permitting the several lines in a given trade to cooperate in the regulation of their rates and the expeditious handling of their business. Very few of the many exporters and importers, who communicated with the Committee, were opposed to agreements and conferences in themselves, provided they are fairly and honestly conducted. Many, however, objected to the secrecy with which agreements and conferences are now conducted; and stated that, while the advantages must be admitted, they have no assurance and no means of knowing whether the conditions claimed for agreements and conferences are always fulfilled. A considerable number of complaints were also filed with the Committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines. Unfortunately the truth of many of these complaints could not be ascertained because of the confidential nature of the information furnished. As pointed out in the report (p. 306), it seemed to be the general impression among shippers who filed complaints with the Committee that the conference lines—

> so completely dominate the shippers with whom they deal that these shippers can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances.

While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action.

Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service.

All monopolies—

As pointed out in the foregoing report (p. 304)—

are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control.

The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of.

The consensus of opinion (see pp. 307 to 308 of the Report)—

As expressed in the testimony of witnesses and in the numerous communications received by the Committee from shippers—

is overwhelmingly in favor of some form of government regulation of steamship carriers engaged in this country's foreign trade. Nearly all the steamship line representatives, who appeared before the Committee, expressed themselves as not opposed to government supervision which is reasonable and which is limited to the requirements of full publicity and approval of all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies. On the other hand, the shippers who appeared as witnesses, or otherwise submitted recommendations for proposed legislation, were in the great majority of instances favorable to a comprehensive system of government supervision, sufficiently broad to embrace the regulation of rates without actually fixing them, the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers. While few of the shippers who communicated with the Committee by letter (and the same may be said of witnesses) attempted to specify

the details of their recommendations, they are almost a unit in stating that they are convinced of the desirability of having the Interstate Commerce Commission, or a similar commission, exercise a general supervisory power over foreign water carriers and enforce among the conference lines at all times the various contentions which they have claimed for themselves during the hearings before the Committee. It is noteworthy that only five of the many communications received by the Committee, which were unfavorable to steamship agreements and conferences as now conducted, display an attitude of hostility toward government regulation. In fact, many of the communications received from shippers make it clear that the writers regard the contentions of the conference line representatives as advantageous to shipper and shipowner if they are honestly and fairly carried out, but state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large corporation or friend to the detriment of other shippers. Such discriminations and arbitrary treatment, it is believed, can only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses.

Relative to such supervisory control by the government of steamship carriers in the foreign trade of the United States, the Committee offers the following recommendations:

(1) That navigation companies, firms or lines engaged in the foreign trade of the United States be brought under the supervision of the Interstate Commerce Commission as regards the regulation of rates, the approval of contracts entered into with other water carriers, with shippers, or with American railroads and other transportation agencies, and such other conditions of water transportation as affect the interests of shippers. The Committee has had under consideration the recommendation of a separate Commission for this purpose, but believes that, in view of the close relations existing between rail and water transportation, it would be best to entrust the supervisory control to the Interstate Commerce Commission. If found necessary, in view of the added duties involved in the extension of the Interstate Commerce Commission's jurisdiction to water transportation in accordance with the recommendations to follow, the Committee further recommends that the membership of the Commission be enlarged.

(2) That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agree-

ments (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies. All modifications and cancellations of such agreements or understandings as may be made from time to time should also be promptly filed. The Commission should be empowered to order canceled any such agreements, or any parts thereof, that it may find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States.

(3) That the Interstate Commerce Commission be empowered to investigate fully complaints charging the unreasonableness or unfairness of rates, or to institute proceedings on its own initiative, and to order such rates changed if convinced that the rate under consideration is unreasonably high, or discriminating in character as between shippers, or ports, or between exporters of the United States and their foreign competitors; and to order restitution to shippers of all sums collected in excess of reasonable rates. This recommendation is also intended to extend to the supervision of freight classifications used by the lines, and the investigation of complaints charging refusal on the part of any carrier to properly adjust the rates between classes of commodities.

The committee realizes that the steamship business differs essentially from that of the railroads (for those differences see pp. 309 to 311 of the Report), and that it might prove injurious to both ship owners and American exporters to require the lines to file their rates and not be permitted to lower the same until after a stipulated period of notice to change rates had been given. On the other hand, the committee feels that in the absence of government control steamship combinations may in many instances have it within their power to arbitrarily raise rates to an unreasonable degree both as regards the general level and in the case of particular commodities; or, if they so desire, to fail in maintaining rates from the United States to foreign markets on a parity with those from other countries. It is not the purpose of this recommendation to prevent steamship lines from promptly lowering their rates to meet competitive conditions and thus to favor American exporters, who, in competing with foreign markets, often find it necessary in order to close their contracts to have quoted an immediate and favorable rate; but the purpose of the law

should be to protect the shipper against any unreasonably high rate which the combination lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of government supervision and control.

(4) That rebating of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal rates to all shippers, irrespective of the volume of freight offered for shipment.

(5) That the Interstate Commerce Commission be empowered to investigate fully all complaints (or to undertake such investigation on its own initiative) charging (1) failure on the part of any carrier to give reasonable notice of increase in rates, (2) unfair treatment of shippers in the matter of cargo space and other facilities, (3) the existence of discriminating or unfair contracts with certain shippers, and (4) unfairness in the settlement of claims and indifference to the landing of freight in proper condition. In this connection the Commission should be empowered to order the discontinuance of all unfair or discriminating practices which it may find to exist, and to adopt whatever measures it may deem necessary to protect the complainant against retaliation.

(6) That the use of "fighting ships" and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason.

(7) That adequate penalties be provided to correct and prevent the abuses hereinabove set forth.

RECOMMENDATIONS RELATING TO WATER CARRIERS ENGAGED IN THE DOMESTIC TRADE.

Unlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few. Competition in rates between domestic water lines, however, has been quite as effectively eliminated

as in the foreign trade and this has been accomplished by the several lines through one or more of the numerous methods discussed in Part II of the foregoing report and summarized on pp. 409 to 412. (Also see pp. 403 to 412 giving a "summary of the extent and methods of control of competition between water carriers in the domestic trade.")

The Act of August 24, 1912, providing for the opening, maintenance, protection and operation of the Panama Canal, contains provisions extending the jurisdiction of the Interstate Commerce Commission over interstate transportation which involves the carriage of property by rail and water, in the following particulars; viz, (1) to establish physical connection, where this is reasonably practicable and justifiable, between the rail carrier and the dock of the water carrier by directing either or both of the carriers to construct the connecting tracks; (2) "to establish through routes and maximum joint rates over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced"; and (3) "to establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates will apply." Section 11 of the Act also provides for the divorcing of common carriers by water from the railroads under certain conditions. These legislative requirements go far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States. The Committee, however, believes, in view of the facts presented in Part II of the report, that additional legislation is required, and wishes to offer the following recommendations:

(1) That the jurisdiction of the Interstate Commerce Commission be extended to the interstate port-to-port traffic of domestic water carriers, with full power to require all such carriers to file their port-to-port rates and to submit reports of their financial and business operations. As regards interstate port-to-port traffic the Commission should be given full power to regulate rates and to determine maximum charges.

(2) That water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements

affecting interstate transportation, whether written or oral, and all modifications or cancellations thereof, with other water carriers, with railroads or other transportation agencies, or with shippers.

(3) That the carriers be prohibited from granting rebates of any kind to shippers and from discriminating between shippers in rates, in the giving of space accommodations and other facilities, and in the making of unfair contracts based on the volume of freight offered. Water carriers should also be prohibited from using fighting ships, or deferred rebates, or from threatening or resorting to retaliatory or other unfair measures against shippers or competitors. The Interstate Commerce Commission should be empowered to adopt whatever measures it may consider necessary to protect shippers or competitors against such retaliatory methods. Water carriers, if cutting rates with a view to driving out a competitor, should be denied the privilege of restoring rates; and jurisdiction should be conferred on the Interstate Commerce Commission to determine whether rates were cut with the object of crushing such competitor.

(4) That the Interstate Commerce Commission be empowered to investigate fully all complaints charging unfairness in the settlement of claims, and indifference to the loading and landing of freight in proper condition; and to adopt all necessary rules and regulations for the adjustment and settlement of claims.

(5) That as regards all matters relating to Interstate transportation, all traffic associations or conferences, whether pertaining to through rail-and-water transportation or to port-to-port traffic only, be brought under the supervision of the Interstate Commerce Commission. The Committee recommends that the conditions under which an outside water carrier is admitted to such associations or conferences should be approved by the Commission, and that an outside line should not be denied membership for unfair reasons or simply because the unanimous consent of existing members of the association or conference to the admission of said line cannot be obtained.

(6) That the railroads be prohibited from making the through rail-and-water route unprofitable as compared with the all-rail route by charging more for the same service on water-borne commodities than they charge for the proportionate share of the all-rail haul.

(7) That the Interstate Commerce Commission be empowered to compel railroads to allow competitive water carriers to apply effective

differentials. The Commission should also have full supervisory power over divisions between railroads and water carriers as regards through rail-and-water rates. The Committee recommends that rate divisions on any trade route should be opened equally to all water carriers that comply with such conditions of quality and regularity of service as the Commission may determine to be reasonable.

(8) That the railroads and water carriers be required to issue through bills of lading to all interstate water carriers that meet such conditions of quality and regularity of service as the Interstate Commerce Commission may consider reasonable.

(9) That railroads be required to account separately to the Interstate Commerce Commission for the income and expenditures of interstate water lines owned or controlled by them.

(10) That railroads be required to make their terminal facilities available to water carriers on equal terms and under such reasonable conditions as the Interstate Commerce Commission may prescribe. The Committee also believes that the Federal Government should pursue a policy of not expending money in the interests of any port for harbor or channel improvements, unless that port has efficient dock facilities available to all water carriers.

(11) That there should be legislation providing for equal treatment to all shippers and water carriers by transfer and lighterage concerns when forming a link in interstate or foreign commerce.

(12) That all interstate traffic on canals be placed under the supervision of the Interstate Commerce Commission; and that the railroads be prohibited in the future from acquiring, either directly or indirectly, ownership and control of or interest in canals, or water lines, forwarding companies and other navigation facilities on such canals, when the same are used in interstate transportation.

Respectfully submitted.

J. W. ALEXANDER,
Chairman.

IN THE SUPREME COURT OF THE UNITED STATES

No. 71-1647

FEDERAL MARITIME COMMISSION v. SEATRAIN LINES, INC., ET AL.

BRIEF FOR RESPONDENT SEATRAIN LINES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, *Petitioner*

v.

SEATRAIN LINES, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT SEATRAIN LINES, INC.

Respondent Seatrain Lines, Inc. accepts the recitation in Petitioner's brief as to the opinions below and the jurisdiction of this Court to hear the instant matter.

ISSUES PRESENTED

I. Whether the United States Court of Appeals for the District of Columbia Circuit was correct in holding that the Federal Maritime Commission was without jurisdiction under Section 15 of the Shipping Act, 1916,

to approve an agreement providing for the acquisition of assets of one common carrier by water by another.

II. Whether the Federal Maritime Commission erred in denying Seatrain standing to protest and in failing to hold a hearing prior to ordering approval of an agreement for the sale of all the assets of one common carrier by water to another such carrier.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 728, 733 (1916), as amended, 46 U.S.C. § 814, is set forth in the addendum to this brief.

STATEMENT

On October 6, 1970, Pacific Far East Lines (PFEL) and the Oceanic Steamship Company (Oceanic), a subsidiary of Matson Navigation Company, common carriers by water in the foreign commerce of the United States, submitted to the Federal Maritime Commission (FMC or Commission) an agreement providing, *inter alia,* for the sale of four Oceanic ships and for the assignment to PFEL of Oceanic's rights in contracts for two vessels under construction with federal construction differential subsidy. In its transmittal letter of October 6, 1970, PFEL noted that "PFEL and Oceanic have been advised by their respective counsel that the contract of sale does not require approval of the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act, 1916, or any other statute administered by your Commission." (Appendix, hereinafter, App., 33) This agreement of sale, later designated Agreement No. 9903, transferred to PFEL all of Oceanic's assets including all personnel and shoreside equipment and

facilities owned by Oceanic related to the vessels. As a result of this transfer, Oceanic retained its corporate existence and was not barred from competing against PFEL or from entering any other trade.

On October 14, 1970, Agreement No. 9903 was noticed in the Federal Register.[1] Seven days later, and within the FMC's allotted 10-day period for response, Seatrain Lines, Inc. (Seatrain) filed a timely protest, request for hearing, and petition to intervene. (App. 35). Seatrain is a common carrier by water. At the time Agreement No. 9903 was offered for approval, Seatrain operated cargo vessels between the United States Pacific Coast and the islands of Hawaii and Guam. Seatrain served Guam in competition with PFEL.[2] PFEL filed its reply on October 23, 1970 (App. 38). Less than two weeks after the Notice in the Federal Register, the Commission denied a hearing and approved Agreement No. 9903 by order dated October 27, 1970 (Appendix to the Petition for Writ of Certiorari, hereinafter P.A., 51), stating that no substantial issues had been raised and that Seatrain lacked standing to protest. On November 6, 1970, Seatrain petitioned for reopening to obtain reconsideration of the approval arguing, *inter alia,* that the proponents of the Agreement failed to meet their burden of proof, and that Seatrain had standing to protest as a participant in the domestic/Pacific trades in competition with PFEL to Guam and as a prospective competitor in the foreign trades. Seatrain pointed out to the Commis-

[1] 35 Federal Register 16114 (1970).

[2] At the time Agreement No. 9903 was offered for approval, Seatrain was seriously considering entering the Pacific trades to the Far East or Australia, areas served by Oceanic prior to the sale. App. 35, 36. Although not reflected in the record, Seatrain now serves the Far East.

sion serious questions directed to the application of the antitrust laws to Agreement 9903 (App. 41, 47, 48). The Commission denied Seatrain's Petition to Reopen on December 8, 1970, contending that:

> The ship sale is not, as Seatrain contends, "on its face a transaction that would violate Section 7 of the Clayton Act" . . . . Here, however, the nature of the Agreement as indicated by its language does not indicate a need for further justification. (P.A. 56)

The Commission once more stated its position that Seatrain lacked standing to protest the Agreement (P.A. 57).

On February 8, 1971, Seatrain sought review of the Commission's Order approving the Agreement in the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 2342(3). Seatrain's petition was founded upon the premise that the Commission erred in refusing Seatrain standing and by failing to hold a hearing prior to approving Agreement No. 9903. This occurred despite Seatrain's timely protest which pointed out the anticompetitive dangers inherent in the merger of these two American-flag common carriers by water in the foreign commerce of the United States. Seatrain's brief to the Court of Appeals pointed out that the Commission's jurisdiction over mergers of the nature encompassed by Agreement 9903 was in question, although Seatrain did not take a position on FMC jurisdictional authority at that time. The Department of Justice, however, representing the United States of America as statutory respondent under 28 U.S.C. § 2344, raised the question of the Commission's Section 15 authority over mergers. Agreeing with the Department of Justice that the Commission lacked authority under Section 15 to approve Agree-

ment 9903, the Court of Appeals held that "[i]t is not the Federal Maritime Commission which has the duty to approve or disapprove the type contract made the subject of this litigation." (P.A. 49) The Court below noted that

> No hearing was held, even though Section 15 itself recognizes that a hearing is appropriate in all cases other than those "of a purely routine nature"; which "have an impact on commerce that the Commission finds is *de minimis*" and those of "a restrictive nature" where the "applicant for approval . . . [satisfies] the burden of demonstrating the need for anticompetitive restraints. . . ." The sale of all Oceanic's assets to Pacific Far East, however, can hardly be said without a hearing to have a *de minimis* impact on competition. (P.A. 48-49) [Footnotes omitted] [Brackets original]

Due to its holding, the Court of Appeals deemed it unnecessary to consider the other issues presented by Seatrain's appeal. (P.A. 49-50)

SUMMARY OF ARGUMENT

Section 15 of the Shipping Act, 1916, requires that every common carrier by water file with the Commission for approval, *inter alia,*

> every agreement with another such carrier or person subject to this act [*inter alia*], . . . controlling, regulating, preventing, or destroying competition . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement or any modification or cancellation

> thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the Commerce of the United States, or to be contrary to the public interest, or to be in violation of this act, and shall approve all other agreements, modifications, or cancellations.
>
> The Commission shall disapprove any such agreement, after notice and hearing, for the finding of inadequate policing of the obligations under it. . . .
>
> Any agreement and any modification or cancellation of any agreement not approved or disapproved by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission. . . . [46 U.S.C. § 814]

These pertinent parts of Section 15, the legislative history of the Shipping Act, 1916, and the case law on principles of statutory construction show two things: first, that the acquisition of the assets of one common carrier by water by another common carrier by water is not the type of agreement which Section 15 either by its literal wording or by its legislative background was intended to encompass; and second, that if the agreement is subject to Section 15, the Commission must hold hearings before approving or disapproving it.

I

It is clear from the language and the legislative history of Section 15 of the Shipping Act, 1916, that the Federal Maritime Commission lacks authority to approve Agreement No. 9903 because it is an acquisition or consolidation of ownership and it is not continuing

in nature. Seatrain's position is that the statutory language does not include consolidations of ownership and clearly limits the FMC's jurisdiction under Section 15 to an ongoing agreement. This Court, quoting the FMC, has noted the plain meaning of the language in Section 15:

> "Section 15 describes in unambiguous language those agreements that must be filed. . . . Since the wording of Section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve." *Volkswagenwerk A.G.* v. *F.M.C.*, 390 U.S. 261, 274, 275 (1968) (quoting from the FMC's decision in *Agreement T-4; Terminal Lease Agreement at Long Beach, Calif.*, 8 F.M.C. 521, 531 (1965)).

Mergers and acquisitions are not enumerated as a type of agreement subject to approval under Section 15, and can not fairly be included by implication. Moreover, even if it were needed here the legislative history shows that it was the intent of Congress when Section 15 was enacted, to limit the FMC's jurisdiction to agreements of an ongoing nature which did not involve consolidations of ownership.

The Commission is empowered to disapprove, cancel or modify any agreement or any modification or cancellation thereof whether or not previously approved by it. But in an agreement for the sale of all the assets of a common carrier by water, there is nothing left for the FMC to modify or cancel once the agreement has been executed and the transfer has taken place. Second, the Commission is given power to disapprove any agreement on a finding of inadequate policing of the obligations under it. Obviously, an agreement which is continuing is the only type which re-

quires policing. Third, Section 15 provides that any agreement shall be lawful "only when and as long as approved by the Commission." Thus, the Commission's approval, unlike the final judgment of a court, is a matter of continuing regulatory supervision.

Even though the statutory language is clear that Section 15 was intended to encompass only ongoing agreements, petitioner has provided an extensive analysis of the legislative history of Section 15 in hopes of supporting its contention that the Commission possesses such jurisdiction. The legislative history, however, demonstrates that Section 15 was intended to remedy problems facing the shipping industry which Congress felt would best be resolved by imposing regulatory jurisdiction over ongoing agreements between carriers by water. By enabling the agency to grant immunity for working agreements which otherwise would have been within the antitrust laws, Section 15 was plainly designed to cover agreements of an ongoing nature. See generally, House Committee on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade,* H. Doc. No. 805, 63d Cong., 2d Sess. (1914) (cited herein as Alexander Report) at 416.

It must be noted that one "cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 218 (1966). It is a fundamental principle long recognized by the Supreme Court that antitrust laws represent a basic national economic policy and "repeals of the antitrust laws by implication from a regulatory stat-

ute are strongly disfavored (citing cases), and have only been found in cases of plain repugnancy between antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963); *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 315 (1897). Morever, where exemptions have been granted from the antitrust laws, the Court has felt itself "'bound to construe them strictly, since . . . [these exemptions are] restrictive of a free economy." *United States* v. *McKesson & Robbins,* 351 U.S. 305, 316 (1956). See *California* v. *Federal Power Commission,* 369 U.S. 482, 485 (1962). As a result, only the clearest language and clearest intent will support a finding that the Commission has jurisdiction to exempt acquisitions such as Agreement No. 9903 from the antitrust laws. Neither the language nor the intent can be shown to support FMC jurisdiction over the acquisition of one carrier's assets by another under Section 15.

Prior to the passage of the Shipping Act of 1916, Congress undertook an extensive investigation into the steamship industry serving United States commerce. This investigation resulted in a report on the industry which has been previously identified as the Alexander Report. The Alexander Report conclusively shows that the Committee's interest was in agreements, conference arrangements, and gentlemen's understandings of an ongoing nature. (Alexander Report, 13-14). Moreover, the legislative history indicates that the Committee made a distinction between these continuing agreements and other methods of controlling competition between water carriers such as acquisitions or the acquiring of ownership. (Alexander Report, 409). In fact, Section 15 was designed to enable the water car-

riers to agree legally to prevent rate wars or other unfavorable conditions without the need for more complete concentration. (Alexander Report, 416). Thus, when Congress enacted the Shipping Act of 1916 it intended to tolerate only the minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines through the method of government supervision of anticompetitive working arrangements. *Isbrandtsen Co., Inc.* v. *United States,* 211 F.2d 51 (D.C. Cir. 1954). The statutory language showing the continuing jurisdiction of the Commission over such agreements shows that only working agreements were encompassed in the legislative grant.

As a general rule, an examination of legislative silence or subsequent legislative action is not a favored way of deriving a reliable view of the legislative intent present when earlier legislation was enacted. *Cleveland* v. *United States,* 329 U.S. 14, 22, 23-24 (1946); *United States* v. *R. J. Reynolds Tobacco Co.,* 325 F. Supp. 656, 662 (D.N.J. 1971). Neither Congressional silence nor later legislative enactments reveal an intent to give merger immunization authority in Section 15 of the Shipping Act, 1916. Moreover, in legislation granting powers to other regulatory agencies such as the Interstate Commerce Commission,[3] the Civil Aeronautics Board,[4] and the Federal Communications Commission,[5] the Congress set forth the merger and

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[3] Interstate Commerce Act §§ 5(2), 5(11), 49 U.S.C. §§ 5(2), 5(11).

[4] Civil Aeronautics Act §§ 408, 414, 49 U.S.C. §§ 1378, 1384.

[5] Federal Communications Act §§ 221, 222, 47 U.S.C. §§ 221, 222.

consolidation authority in clear and specific language. Without a specific legislative grant to the FMC under Section 15, the Commission has no jurisdiction over the acquisition by PFEL of all of Oceanic's assets.

II

The express statutory language of Section 15 requires that the Commission "shall by order, after notice and hearing" disapprove or approve agreements filed with it based upon the interests to be considered which are also set forth in Section 15.[6] Seatrain's position is that the sale of all the assets and operations of one steamship company to another is neither routine nor does it have a *de minimis* impact on commerce, and that the FMC erred in failing to hold hearings on the approvability of Agreement 9903. Even if Seatrain had not filed a timely protest alerting the Commission as to the important questions, antitrust and otherwise, presented by Agreement 9903, the Commission, as part of its statutory duty to determine what is "contrary to the public interest," of its own instigation should have more fully explored the issues presented by Agreement No. 9903. An agency's duty to guard the public interest includes raising issues *sua sponte*. *Marine Space Enclosures* v. *F.M.C., supra,* 420 F.2d at 585.

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[6] To this absolute statutory requirement of holding a hearing prior to Commission action on agreements, there may be an exception for agreements of a "routine" nature or which have a "*de minimis*" impact on commerce. *Volkswagenwerk A. G.* v. *Federal Maritime Commission,* 390 U.S. 261, 276 (1968); *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission and United States,* 420 F.2d 577, 584 (D.C. Cir. 1969).

On its face an agreement for the sale of all the assets of one major American common carrier by water in the foreign commerce of the United States to another such carrier presents questions clearly within the scope of Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended by the Celler-Kefauver Act of 1950. 64 Stat. 1125, 1126 (1950). Had the FMC not claimed jurisdiction over it, Agreement 9903 would have been subject to the standard antitrust tests. In administrative proceedings, private citizens often play a role in the effectuation of antitrust policy, and "the pennant of 'private attorney general' may be hoisted by anyone with an economic stake who desires to signal issues of public interest, [and] may be run to the very pinnacle of the mast in order to alert all concerned to storm signals of anticompetitive restraints." *Marine Space Enclosures* v. *F.M.C., supra,* 420 F. 2d at 591.

After the FMC's order of approval of Agreement No. 9903, Seatrain's Petition to Reopen again raised the warning flag to the Commission that the approval of Agreement No. 9903 was unsupported by substantial evidence and was in violation of the hearing requirement contained in Section 15 of the Shipping Act. (App. 41)

As to the matter of standing, and aside from its rights as a private attorney general, Seatrain was an active competitor with PFEL in the Pacific Coast/Guam domestic trades, and at the time of approval was seriously considering entering into the Far East trades served by Oceanic and PFEL. (App. 35, 36) PFEL had applied to the Maritime Administration for permission under Section 805(a) of the Merchant Marine Act, 1936, to serve Hawaii as part of its subsidized services in the

Pacific foreign trades while Seatrain was an active participant in the trade between Hawaii and the Pacific Coast. (App. 36) Seatrain warned the FMC that the merger of PFEL and Oceanic eliminated both existing and prospective competition between those companies and increased the size and strength of PFEL. *Id.* Although the Commission pointed out in its order that there was nothing which would prevent PFEL and Oceanic from competing with each other anywhere at any future time (P.A. 51, 53), the fact remains that Oceanic was left a mere corporate shell without ships or other facilities for competing with anyone. In *Matson Navigation Co.* v. *F.M.C.*, 405 F.2d 796, 798 (9th Cir. 1968) the court observed that one common carrier by water had standing to protest a merger of other common carriers by water because such activity presented a threat of increased competition. See *Scanwell Laboratories* v. *Federal Aviation Administration*, 424 F.2d 859 (D.C. Cir. 1970). In the instant case it is clear that the FMC had an obligation to hold a hearing on the approvability of Agreement No. 9903, and that Seatrain had standing to be heard in that required hearing.

I. THE FEDERAL MARITIME COMMISSION LACKS JURISDICTION UNDER SECTION 15 OF THE SHIPPING ACT, 1916, TO APPROVE AN AGREEMENT PROVIDING FOR THE ACQUISITION OF ASSETS OF ONE COMMON CARRIER BY WATER BY ANOTHER.

Seatrain's position is that the statutory language of Section 15 of the Shipping Act, its legislative history, and the applicable cases demonstrate that the Commission lacks jurisdiction over an agreement under which one major American common carrier by water purchases all the vessels and operating equipment of another because the Commission's jurisdiction does not include mergers, acquisitions or other agreements of a non-continuing nature. Of the three courts who have passed on the jurisdiction question,[7] two—Judge Garth in *Reynolds* and the D.C. Circuit in *Seatrain*—after extensive analyses of Section 15 and its background, held that the FMC had no merger/acquisition jurisdiction.

By a two-to-one judge majority, the third court apparently felt compelled to find FMC merger jurisdiction because of this Court's statement in *Volkswagenwerk A.G.* v. *F.M.C.*[8] that Section 15 of the Shipping Act, 1916, was to be broadly construed. *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F.2d 796, 800 (9th Cir. 1968). Seatrain submits that

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[7] (1) *Seatrain Lines, Inc.* v. *F.M.C.*, 460 F.2d 932 (D.C. Cir. 1972)

(2) *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F.2d 796 (9th Cir. 1968)

(3) *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971).

[8] 390 U.S. 261 (1961), a case not involving a merger agreement.

even a broad construction of Section 15 should not bring matters within the statute which are not specifically included in that section or which cannot be fairly implied into the statute from the legislative intent at the time of enactment.

A. The Specific Language of Section 15 Does Not Give the Commission Authority Over Consolidations of Ownership or Agreements Which Are Not Ongoing.

Language for FMC merger or acquisition approval authority is not set forth in Section 15. The statute gives the Commission jurisdiction over agreements:[9]

> fixing or regulating transportation rates or fares;
>
> giving or receiving special rates, accommodations or other special privileges or advantages;
>
> controlling, regulation, preventing, or destroying competition;
>
> pooling or apportioning earnings, losses, or traffic;
>
> allotting ports or restricting or otherwise regulating the number and character of sailings between ports;
>
> limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or
>
> in any manner providing for an exclusive preferential, or cooperative working arrangement.

No language in Section 15 gives the FMC jurisdiction over consolidations of ownership, and each agreement listed is a type of business arrangement made

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[9] In Section 15 "agreement includes understanding, conferences, and other arrangements."

by a carrier to maintain normal operations in a trade. A merger or an acquisition of all the assets of one common carrier by water by another is neither routine nor is it made in the normal course of business. The types of Section 15 agreement enumerated assume the continuous independent existence of the participants, and are directed to viable and separate parties. The final clause is *ejusdem generis* and encompasses all the types of agreements mentioned in each of the other clauses. It sets forth the general area of regulation in expansive language and serves to support the position that agreements within Section 15 must be of an ongoing or "working" nature.

Other paragraphs of Section 15 further the view that continuing agreements are the only category brought within the statute. The second paragraph of Section 15 empowers the FMC to "disapprove, cancel or modify any agreement . . . whether or not previously approved by it" if contrary to the purpose of the Act. This clearly refers to ongoing agreements. The third paragraph of the section enables the Commission to disapprove an agreement if it finds "inadequate policing" of the obligations thereunder. Only continuing agreements require "policing" and there is nothing for the FMC to regulate once a merger or acquisition has been completed.[10]

Lastly, the fourth paragraph of Section 15 provides that "agreements . . . shall be lawful only when *and as long as* approved by the Commission." (Emphasis added) The statute contemplates continuing agreements over which the FMC can utilize its regulatory

[10] Unlike the FCC, CAB and ICC, the FMC has no divestiture powers under Section 11 of the Clayton Act, 15 U.S.C. § 21.

expertise to assure that carrier activity coincides with the intent of the Act. Since as noted in footnote 10, *supra*, the FMC is without divestiture authority, a merger or acquisition once completed is beyond the reach of the Commission, regardless of the regulatory interests touched thereby. Section 15 does not by its terms apply to mergers or acquisitions.

B. The Legislative History of Section 15 Shows That Congress Did Not Intend to Give the FMC Jurisdiction Over Mergers or Over Non-Continuing Agreements.

Recognizing the clarity of Section 15, this Court quoted the Commission in *Volkswagenwerk A. G.* v. *Federal Maritime Commission*, 390 U.S. 261 (1968):

> Section 15 describes in unambiguous language those agreements that must be filed. . . . Since the wording of Section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve. (390 U.S. at 274, 275.)

Although the plain statutory language requires no resort to the legislative history of Section 15 to show that the FMC has no merger authority, petitioner contends the background of the section supports a finding of jurisdiction. (Petitioner's Brief, 8). On the contrary, an analysis of the history of Section 15 shows that the section was designed to prevent wholesale mergers and massive concentrations of ownership through the device of allowing anticompetitive but ongoing agreements between persons in the steamship industry. (Alexander Report, 416).

Prior to the enactment of the Shipping Act, Congress authorized the House Committee on Merchant Marine and Fisheries to conduct an "exhaustive inquiry into the practices of shipping conferences." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481,

488 (1958). The product of the Committee's toil was the Alexander Report which was the source of the Congressional policy embodied in the Shipping Act. (Alexander Report, 419-20.) Of the eighty agreements in the foreign trades examined by the Committee, not one was a merger or other form of corporate reorganization. *Id.* 218-295. The Alexander Report summarized its findings as follows:

> The facts contained in the foregoing report show that it is almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written *agreements, conference arrangements, or gentlemen's understandings,* which have for their principal purpose the regulation of competition through either (1) the fixing or regulating of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report . . . . The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line representatives and the exporting and importing interests of the United States. . . . (Alexander Report, 415.) [Emphasis added.]

The agreements examined by the Alexander Committee described practices in which two or more shipping companies agreed to participate over a considerable period of time. But none resembled a merger "which is essentially a single, discrete event, [and]

which transforms the relationship of the merging parties at the instant of merger." *United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659.

According to the *Reynolds* court, the Alexander Report, when referring to "consolidation by ownership" and "control through acquisition" never used the word "agreement" to refer to a merger agreement. *U.S.* v. *R. J. Reynolds Tobacco Co., supra,* at 659. Moreover, the Committee made a distinction between consolidation agreements and other types of agreements as shown by this comment which happens to be on the domestic trade:

> The numerous methods of controlling competition between water carriers in the domestic trade, referred to on preceding pages, may be grouped under three headings, viz, (1) control through *acquisition* of water lines or the *ownership* of accessories to the lines; (2) control through agreements or understandings; and (3) control through special practices. (Alexander Report, 409.) [Emphasis as in original].

Thus, Section 15 was enacted to regulate a limited type of ongoing agreement by preventing abuses while allowing proper utilization of such agreements. The Committee reported that:

> Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership . . . [E]ither would

> mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. (Alexander Report, 416.)

The Committee felt that mergers, which by their nature cause the disappearance of individual carriers and reduce competition, were undesirable. *Id.* 301, 416-18; *United States* v. *R. J. Reynolds Tobacco Co., supra*, 325 F. Supp. at 660. The Committee was also of the opinion that it would be beneficial to shippers to have cooperative working agreements filed with the government and available for public inspection since these agreements had customarily been kept secret. (Alexander Report, 307, 311-313, 416.) Unlike mergers, cooperative working agreements do not permanently eliminate all competition between the parties and are subject to modification or disapproval by the Commission.

The Committee originally selected and recommended the Interstate Commerce Commission as the agency to receive the authority to regulate maritime agreements. This selection supports the conclusion that antitrust immunity for consolidations of ownership was not intended to be conferred on the FMC by the Shipping Act, 1916. (Alexander Report, 419, 420). In 1915, the ICC did not have full acquisition jurisdiction; in fact it was not until 1940 that the Interstate Commerce Act was amended to include consolidation and merger. 54 Stat. 899, 905 (1940). Actually, the ICC did not even acquire limited antitrust immunity authority until 1920. 41 Stat. 456, 481, 482 (1920). Thus, as the Committee envisioned it, the ICC, which was without acquisition or other antitrust authority, was originally intended to regulate maritime commerce. It does not make sense to assume that the committee intended to give the ICC extensive antitrust immunity powers over

mergers while other areas of ICC jurisdiction, e.g. railroads, could not be given antitrust exemptions. One must conclude that the original proposal to give the ICC jurisdiction was because Section 15 was never intended to give authority for antitrust immunity for mergers or for non-continuing agreements.

C. The Principles of Statutory Construction and the Consolidation Authority of Other Federal Administrative Agencies Show That Section 15 Does Not Give the Commission Jurisdiction Over Consolidations of Ownership.

The principles of statutory construction and an examination of the language enabling other federal administrative agencies to grant antitrust immunity for agreements of merger, consolidation, and acquisition further demonstrates that Section 15 of the Shipping Act does not grant the FMC such authority.

1. Statutory Construction

"[T]he antitrust laws represent a fundamental national economic policy" [11] and "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." [12] Exemptions from the antitrust laws are strictly construed [13] since they are restrictive of a free economy, and this Court "cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to

[11] *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966).

[12] *United States* v. *Philadelphia Natl. Bank*, 374 U.S. 321, 350-351 (1963).

[13] *United States* v. *McKesson & Robbins*, 351 U.S. 305, 316 (1956).

render the more general provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co.* v. *Pacific Westbound Conf., supra,* at 216; *Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931, 935 (D.C. Cir. 1971), *cert.* denied, 404 U.S. 1047 (1972).

Section 15 sets forth the full extent of the agreements to which the Commission may grant antitrust immunity and "[i]f Congress had desired to grant any further immunity [it] would doubtless have said so." *United States* v. *Borden Co.,* 308 U.S. 188, 201 (1939). The silence of Congress in Section 15 as to consolidations of ownership or mergers must mean that there was no intent to include such agreements for consideration under the Shipping Act of 1916.[14] Petitioner's strained effort to imply from silence that Congress had a contrary intent is not a favored method of statutory interpretation. *Cleveland* v. *United States,* 329 U.S. 14, 22, 23-24 (Rutledge, J., concurring opinion) (1946); *United States* v. *R. J. Reynolds Tobacco Co., supra* at 662.

Petitioner's attempt to read merger authority into Section 15 by examining legislation enacted long after that section became law or by demonstrating the Commission's own actions or views as to its merger au-

[14] A 1917 analysis of the Shipping Act of 1916 described Section 15 as regulating "pooling, rate and other cooperative agreements. . . ." *Current Legislation, Government Regulation of Private Shipping,* 17 COLUM. L. REV. 357, 358 (1917). A recent note concludes that merger jurisdiction is not vested in the FMC by Section 15 of the Shipping Act, but points out that certain public policy considerations would be ignored by a strict construction of the statute. Note, *The Shipping Industry Needs a Safe Haven: Merger Jurisdiction for the FMC?* 5 LAW AND POLICY IN INTERNATIONAL BUSINESS, 274 (1973). Seatrain submits that public policy decisions are the responsibility of Congress, and that body has not decided to give the FMC acquisition jurisdiction.

thority is completely unfounded. The 1950 amendment to Section 7 of the Clayton Act, which extended that Act's coverage to include the acquisition of assets, exempted from the Act transactions taking place under *existing* agency antitrust immunity authority, but conferred no greater authority to the agencies concerned. 64 Stat. 1125 (1950). Although the FMC's predecessor was one of the agencies mentioned in that 1950 amendment, its inclusion is not inconsistent with the FMC's jurisdiction over continuing agreements. Moreover, this Court has held that the amendment was "plainly not a grant of power to adjudicate antitrust issues" because it was not intended to be the source of any new authority. *California* v. *F.P.C.*, 369 U.S. 482, 486 (1962). *See* S. Rep. No. 1775, 81st Cong., 2d Sess., 7.

Although an administrative agency's interpretation of its establishing legislation is entitled to deference in the courts, "the courts are the final authorities on issues of statutory construction" and " 'are not obligated to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Volkswagenwerk A. G.* v. *F.M.C.*, 390 U.S. 261, 272 (1968); cf. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499-500 (1958) (overturning FMC predecessor agency's construction of Section 14 of the Shipping Act). Petitioner, by erroneous interpretation of its enabling statute, cannot bootstrap its way into jurisdiction over mergers or other consolidations of ownership.[18]

[18] The acquisitions cited by petitioner which received FMC approval, all involved some ongoing agreement. But we do not concede that the FMC has jurisdiction over any type of acquisition of ownership.

2. The Consolidation Authority of Other Federal Agencies

The fact that Congress was specific when it granted other federal administrative agencies the power to immunize mergers confirms the view that no such authority was intended to be granted in Section 15 of the Shipping Act of 1916. The Civil Aeronautics Act gives the Civil Aeronautics Board clear authority over consolidation, merger and acquisition of control in Section 408 (49 U.S.C. § 1378). We invite the Court's attention to Section 412 (49 U.S.C. § 1382), which requires filing for CAB approval of agreements:

> between such air carrier and any other air carrier . . . for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges or classifications . . . or for *controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.* [Emphasis added]

The similarity between Section 412 above and Section 15 of the Shipping Act is striking, but Section 412 does not give the CAB merger authority. The CAB gets its consolidation of ownership authority from Section 408. There is no authority granted to the FMC similar to Section 408; the FMC's Section 15 authority is merely similar to that of the CAB under Section 412.

The Interstate Commerce Act, Section 5(2), authorizes the ICC to give approval for "two or more carriers to consolidate or merge. . . ." 49 U.S.C. § 5(2)(a)(i). Similarly, the Federal Communications Act provides that it shall be lawful, subject to Federal

Communications Commission approval, for "any two or more domestic telegraph carriers to effect consolidation or merger." 47 U.S.C. § 222(b). The care and specificity used in these statutes empowering agencies to approve mergers demonstrates that Congress knew how to use plain and definitive language to describe the authority granted. Section 15 cannot be found to include authority to approve Agreement 9903 based on its actual language, any implication drawn therefrom, its legislative history, or the subsequent actions of Congress or the Commission.

II. THE COMMISSION ERRED IN FAILING TO HOLD A HEARING PRIOR TO APPROVING AGREEMENT NO. 9903, AND IT ERRED IN DENYING STANDING TO SEATRAIN, A COMPETITOR WITH PFEL IN THE DOMESTIC TRADES AND A POTENTIAL COMPETITOR OF BOTH PFEL AND OCEANIC IN THE FOREIGN TRADES.

Whether or not the Court finds FMC merger jurisdiction, we urge that the issue which sparked this litigation be resolved. That issue concerns the right of Seatrain or any other interested party to intervene and to be heard prior to FMC action on an agreement filed under Section 15 which may have an effect on the interested party's present or future competitive position. The FMC's failure to grant hearings in this and other cases has generated much litigation. *Marine Space Enclosures, Inc.* v. *FMC, supra.* Section 15 of the Shipping Act, 1916, requires that the FMC hold a hearing prior to ordering approval of an agreement.[16] The FMC should have granted Seatrain standing to protest

[16] There may be an exception to this rule for agreements of a routine nature or which have a *de minimis* impact on commerce. *Volkswagenwerk A. G.* v. *FMC, supra,* 390 U.S. at 276, *Marine Space Enclosures* v. *FMC,* supra, 420 F.2d at 584, n.14.

Agreement No. 9903 because of its position as a competitor with PFEL in the domestic trade and as a potential competitor of both PFEL and Oceanic in the Far East trade. (App. 35, 36, 41)

A. The Commission Erred in Failing to Hold a Hearing Before Approving Agreement No. 9903.

Section 15 of the Shipping Act, 1916, requires that the Commission

> shall by order, *after notice and hearing,* disapprove, cancel or modify any agreement . . . whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements. . . . [Emphasis added]

The absolute requirement of the statutory language for hearing prior to Commission action under Section 15 has been interpreted by this Court to mean nothing less than to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry."[17] *Volkswagenwerk A. G.* v. *FMC, supra* at 276. The Court noted, however, that:

> This is not to say that the Commission is without power to determine after appropriate administrative proceedings, that some types or classes of agreements coming within the literal provisions of § 15 are of such a *de minimis* or routine character as not to require formal filing. *Id., Marine Space*

[17] Except those non-continuing consolidation agreements which are not within Section 15 as shown in this brief, *supra.* pp. 14-25.

Enclosures, Inc. v. *FMC,* 420 F.2d 577, 584 n.14. (D.C. Cir. 1969).[18]

The acquisition of all of Oceanic's assets by PFEL, however, is plainly a matter which is neither routine nor of a *de minimis* impact. Even if Seatrain had not filed its timely protest, the FMC's statutory duty under Section 15 to determine whether Agreement 9903 was discriminatory or unfair, operated to the detriment of the commerce of the United States, was contrary to the public interest, or was in violation of the Act, should have resulted in a reasonable analysis of the agreement instead of the comment that:

> Here, however, the nature of the agreement as indicated by its language does not indicate a need for further justification, and nothing has been raised by Seatrain which indicates that it is required. (Commission's Denial of Petition to Reopen, December 8, 1970, P.A. 56)

The FMC's refusal to look beyond the face of Agreement 9903 is contrary to the agency's duty to take necessary action under the statute in weighing antitrust considerations to protect the public interest.[19] As the Court of Appeals noted in *Marine Space Enclosures* v. *FMC, supra:*

> Section 15 requires an affirmative act of approval. The significance of this is undeniable. On the one hand, it is unlawful to act in pursuance of the

[18] Subseqently, Congress amended the Shipping Act by adding § 833(a) to Title 46 of the United States Code which empowers the FMC to exempt certain unspecified classes of agreements from filing requirements as long as the class of agreements are found not to contravene the Commission's statutory obligations. Considering the importance of the antitrust laws, it is unlikely that the Commission would find acquisition agreements appropriate for exemption and no such exemption is involved here.

[19] cf. *F.M.C.* v. *Svenska Amerika Linien,* 390 U.S. 238 (1968).

> agreement prior to receipt of approval. On the other hand, the Commission's imprimatur, when received, carries with it immunity from the antitrust laws. It would be travesty to suppose that Congress meticulously required an appropriate hearing and reasoned disposition as a condition of disapproval of industry agreements but was prepared to acquiesce in agency approval on the basis of back-office and one-sided conversation, and unpublished disposition unaccompanied by reasoned analysis and opportunity for appropriate presentation of objection, evidence and argument. What the words of § 15 fairly indicate is that an appropriate hearing shall be held prior to either approval or disapproval. 420 F.2d at 583-584. [Footnotes omitted.]

For the FMC to order an approval or a disapproval under Section 15, the Commission is bound to hold a hearing to subject the filed agreement to a searching examination, particularly where the Commission has been alerted to the potential issues and antitrust considerations by a timely protest and request for hearing. Even where there is no filed protest, the FMC has an obligation to consider the implications of the agreement on its own motion under its statutory duty to ensure that approval contravenes no policy of the Shipping Act. For example:

> Antitrust questions in general, and in particular contracts involving such all-encompassing restraints, present issues of the kind that should be explored *sua sponte* in order to discharge an agency's active and independent duty to guard the public interest, "and if need be, the Commission should order a hearing to ascertain whether there exists alternative courses other than those suggested by the applicant." (Footnote omitted) *Marine Space Enclosures, Inc.* v. *FMC, supra,* 420 F.2d at 585.

Likewise, the Commission has recognized that the consideration of agreements is not limited to the bare bones of the arrangements presented for approval to which it limited itself in Agreement 9903. In *Agreement No. T-4; Terminal Lease Agreement at Long Beach, California,* 8 F.M.C. 521, 529 (1965), the FMC set forth its views as to the scope of examination in Section 15 cases:

> In discharging our duties under section 15, we are not limited to those matters parties to agreements wish us to see. *We are required to go further. Where agreements are strongly protested, as here, we must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements.* Section 15 is concerned with competitive relationships and the limited lessening of competition in the furtherance of our maritime transportation policy. Thus, to determine if an agreement falls within the requirements of section 15, we must consider in the interests of uniform, enlightened regulation to what extent the agreements affect competition. To decide otherwise is merely to remand the clever draftsman at the expense of our regulatory responsibility. (8 F.M.C. at 529.) [Emphasis added]

Under Section 15, the FMC's duty to hold a hearing prior to approval of an agreement is even stronger where, as here, (1) a protest and request for hearing is filed and, (2) the agreement itself absent section 15 approval clearly would be subject to attack under the antitrust laws.[20] But in disregard of its own rules

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[20] Section 7 of the Clayton Act, as amended, provides, *inter alia,* that "no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capi-

and the judicial admonitions, the Commission failed to hold a hearing for Agreement 9903.

The Congressional mandate of Section 15 is to permit the invasion of the national antitrust policy only to the extent absolutely necessary. Thus:

> [T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the antitrust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. *Isbrandtsen Co., Inc.* v. *United States*, 211 F.2d 51, 57 (D.C. Cir. 1954), *cert. de-*

tal and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18, 38 Stat. 730 (1914), 64 Stat. 1125 (1950). PFEL's acquisition of all of Oceanic's operating assets is on its face within the statute, but without an evidentiary record the market definition for a showing of substantial lessening of competition in violation of the Clayton Act is difficult to assess. Competition between the company acquired and the company acquiring is not a requirement, because the purchase may enhance the strength of the acquiring company to a position of undue advantage resulting in a substantial lessening of competition. *U.S.* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958). The foreclosure of prospective competition between merging companies is sufficient for a violation. *Proctor & Gamble Co. (Clorox)* v. *F.T.C.*, 386 U.S. 568 (1961); *U.S.* v. *Philadelphia Natl. Bank*, 374 U.S. 321, 362 (1963). The PFEL purchase of Oceanic's assets certainly foreclosed competition between the two and may have given PFEL an undue advantage as well. The FMC's cursory handling of Agreement 9903 does not make possible any meaningful analysis of the scope of the antitrust questions raised by Seatrain.

nied sub nom.; Japan-Atlantic Gulf Conf. v. *United States,* 347 U.S. 990 (1954).

Because it failed to hold a hearing on Agreement 9903 and since it admittedly relies solely on the language in that Agreement [21] as a basis for approval, the Commission could not ascertain the extent of the intrusion into the antitrust laws presented by the sale and thus was in disregard of its duties under the statute and as interpreted by the courts. Before an agency may override antitrust principles, "the proper antitrust questions must be asked and answered." [22] In approving Agreement 9903, the Commission erroneously denied a proper party the right to a hearing, and it did not bother to ask any questions. We urge the Court to hold that the FMC's failure to hold a hearing after receiving a protest from a proper party was error.

B. The Commission Erred in Denying Standing to Seatrain, a Competitor with PFEL in the Domestic Trades and a Potential Competitor of Both PFEL and Oceanic in the Foreign Trades.

One of the bases for the Commission's refusal to hold a hearing prior to approving Agreement 9903 was its finding that Seatrain lacked standing. Order Approving Agreement No. 9903 (P.A. 53). The notice appearing in the October 14, 1970 issue of the "Federal Register" (35 Fed. Reg. 16114) for Agreement No. 9903, however, merely asked for a "clear and concise statement of the matters upon which [interested parties] desire to advance evidence" and that the acts or circumstances alleged to constitute a violation of the

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[21] Denial of Petition to Reopen (P.A. 56)

[22] *National Air Carrier Assoc. et al.* v. *C.A.B.,* 436 F.2d 185, 194 (D.C. Cir. 1970).

Act or a detriment to commerce be stated with particularity. Seatrain's timely protest which pointed out the prejudice to itself and other prospective entrants into the trade, the elimination of potential competition between PFEL and Oceanic, the Clayton Act problem, and Seatrain's fear that Oceanic's two vessels under construction with federal subsidy would be used by PFEL in competition with Seatrain in the trade between Guam and Hawaii and the Pacific Coast, satisfied this requirement (App. 35). Seatrain's subsequent petition seeking reopening further amplified and clarified its interest, *inter alia,* in preventing unfair competition to its domestic service, in intervening as a prospective competitor in the foreign trades, and by delineating the factual issues which supported its request for a full evidentiary hearing. (App. 41, 45, 47). The Commission in its order of approval noted that "there must be sufficient information brought to . . . [the FMC's] . . . attention to activate the hearing requirements." (P.A. 52). Even though Seatrain provided enough data to trigger a hearing under this standard, this Commission requirement places a burden on a protestant which is not justified by the cases and which is in direct conflict with the provision in Section 15 that the FMC act only "after notice and hearing." Contrary to that agency's stated view, it is the Commission's burden to justify the denial of Seatrain's right to a hearing:

> [W]e have under consideration an administrative action that is mandated for hearing by § 15 of the Shipping Act. The burden is not on the person who wants an unusual hearing (as in the case of rule-making or waiver) but on the agency desiring the unusual dispensation from hearing. *Marine Space Enclosures, Inc.* v. *FMC, supra,* at 586-7, n. 26.

As noted, Seatrain was a competitor of PFEL in the Pacific Coast/Guam trade and would have been directly affected by approval of Agreement 9903. The fact that Seatrain was only a prospective competitor with PFEL and Oceanic in other trades is not a reason for denying Seatrain standing.[23] *Scanwell Laboratories,* v. *Federal Aviation Administration,* 424 F.2d 859 (D.C. Cir. 1970); *Sea-Land Service, Inc.* v. *Connor,* 418 F.2d 1142 (D.C. Cir. 1969). The Court of Appeals for the District of Columbia Circuit discussed a potential competitor's standing to object to administrative action in *Marine Space Enclosures, Inc., supra,* stating:

> Petitioner's standing as a competitor, however, is established not only by its interest as a potential competitor, but by the nexus between that interest and the substantive objection that an order approving the agreements would not be in the public interest because of the way it operates to foreclose competition. Even a potential competitor has standing to present non-frivolous claims of undue restraint on future competition.
>
> The pennant of "private attorney general," may be hoisted by anyone with an economic stake who desires to signal issues of public interest, may be run to the very pinnacle of the mast in order to alert all concerned to storm signals of anticompetitive restraints. *Marine Space Enclosures, Inc.* v. *F.M.C., supra,* at 598-99.

And in *Matson Navigation Co.* v. *FMC, supra,* the court discussed the standing of a protestant who would suffer increased competition by approval of an agreement:

> The Commission found that Matson would suffer no injury as a result of the merger but would face greater competition. This is sufficient to give

standing. *F.C.C.* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943); *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4 (1942); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). Further, if the Commission has power under § 15 to approve the agreement, the result would be to immunize the merger from the provisions of the antitrust laws, and Matson could never attack it in the future should injury later result. *Sunshine Coal Company* v. *Adkins*, 310 U.S. 381, 401-04 (1940).

We conclude that Matson has standing to seek review. 405 F.2d at 798.

Seatrain, as an actual and a potential competitor and having a clear interest in Agreement 9903, had standing to protest the agreement and was entitled as a matter of right to a hearing thereon. The Commission erred in denying Seatrain the hearing it requested and we ask the Court to so find.

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[28] *See* note 2 *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below be affirmed. ~~Whether or not~~ this Court finds FMC jurisdiction over Agreement 9903, it is respectfully requested that the Court remand this case with instructions to the Commission to hold a hearing on the agreement and to grant Seatrain Lines, Inc. standing to appear at such hearing.

Respectfully submitted,

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ADDENDUM

Section 15 of the Shipping Act, 1916
46 U.S.C. § 814

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifica-

tions, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations pertaining thereto (including changes in special rates, fares, and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval

upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1—11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. (Sept. 7, 1916, ch. 451, § 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, ch. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; Oct. 3, 1961, Pub. L. 87—346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub. L. 88—275, 78 Stat. 148.)

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SEATRAIN LINES, INC., PACIFIC FAR EAST LINES, INC. AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–50) is reported at 460 F. 2d 932. The memorandum order of the Federal Maritime Commission, approving Agreement No. 9903 and denying a request for investigation and hearing (Pet. App. 51–54), is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1972. The petition for a writ of certiorari was filed on June 20, 1972; it was granted on December 11, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350.

QUESTION PRESENTED

Whether Section 15 of the Shipping Act, 1916, which provides that certain agreements among water common carriers must be filed with the Federal Maritime Commission and, if approved by the Commission, are immune from the antitrust laws, covers an agreement for the acquisition of one carrier's assets by another.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, provides in pertinent part:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. * * *

* * * * * *

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission * * *.

* * * * *

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of [the antitrust laws] * * *.

* * * * * *

STATEMENT

A. The acquisition

Respondents Pacific Far East Line, Inc. ("PFEL") and Oceanic Steamship Company ("Oceanic") are common carriers by water engaged in the foreign commerce of the United States. On October 1, 1970, they entered into an agreement providing for the sale by Oceanic of all its assets to PFEL (App. 2–32).[1] Under the agreement, Oceanic transferred to PFEL its entire fleet of four operating vessels, together with their equipment, its interest in two container ships then under construction, and its shoreside property and equipment.[2] The agreement also provided for the transfer of Oceanic's employees (App. 11–15); however, Oceanic, a wholly-owned subsidiary of Matson Navigation Company, was permitted to retain its corporate existence and was not foreclosed by the agreement from reentering the trade in the future and competing with PFEL (Pet. App. 19).

---

[1] PFEL, the acquiring firm, is a subsidiary of Consolidated Freightways, Inc., which, prior to the transaction involved here, had acquired 51 per cent of PFEL's stock. Moody, *Transportation Manual*, p. 1601 (1970) (App. 66). Consolidated Freightways is a holding company which has subsidiaries engaged in the businesses of motor freight carriage, ocean shipping, warehousing and transportation equipment manufacturing (*ibid.*). In 1969, the last full year prior to the PFEL-Oceanic agreement, it had operating revenues in excess of $450 million and ranked 19th in operating revenues among the nation's largest transportation companies. Fortune, *Directory of 500 U.S. Industrial Corporations and 50 Largest Banks, Retailing, Transportation, etc. Companies*, p. 38 (May 1970) (App. 60).

[2] Oceanic's vessels operated as the only United States-flag carriers in the North American Pacific Coast-Australasian Trade (App. 38).

By letter dated October 6, 1970, the parties transmitted the agreement to the Federal Maritime Commission, stating (App. 33) that they had "been advised by their respective counsel that the Contract of Sale does not require approval of the * * * Commission under the provisions of Section 15 of the Shipping Act, 1916 * * *." They requested, however, that the letter be considered as "an application for such approval" (*ibid.*) if the Commission should be of a contrary view.

B. Proceedings before the Federal Maritime Commission

The Commission published notice of the agreement, designated Agreement No. 9903, in the *Federal Register* on October 14, 1970 (35 Fed. Reg. 16114), allowing ten days for interested parties to comment or request a hearing. On October 21, 1970, respondent Seatrain Lines, Inc. ("Seatrain"), a common carrier by water serving certain Pacific, Hawaii, and Guam trades, filed a protest and requested a hearing to explore the "anticompetitive and prejudicial consequences" of the agreement (App. 35). The protest alleged that Seatrain was "considering entry" into trade routes in which PFEL and Oceanic operate (App. 35); it objected to the agreement as producing a "concentration of competition on these routes," thereby erecting "a formidable barrier to the entry of any prospective competitor such as Seatrain" (App. 36). "Agreement No. 9903," it further asserted, "will operate to the detriment of the commerce of the

United States, and will be contrary to the public interest" (*ibid.*).

Six days later, following receipt of PFEL's response (App. 38–40), the Commission, on October 27, 1970, issued a memorandum order approving the agreement and denying Seatrain's request for an investigation and hearing. It concluded that Seatrain had failed to present "sufficient information" to require a Section 15 hearing, since, in the Commission's view, the carrier had not indicated that it was in competition with either of the parties, that the agreement prevented it from competing with PFEL in the future, or that PFEL and Oceanic were foreclosed "from competing with each other anywhere at any future time" (Pet. App. 53). The Commission held that Seatrain had "no standing in this matter" and dismissed the protest as "without substance"; without discussing the question of its jurisdiction, it approved the agreement "under section 15 of the Shipping Act, 1916" (*id.* at 53–54). Seatrain's petition to reopen was denied (Pet. App. 55–57).

C. The proceedings in the court of appeals

Seatrain filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. The United States, which was a statutory respondent, contended that the Commission had no jurisdiction to approve this particular acquisition agreement, and that its approval was, in any event, in error.

In a comprehensive opinion, the court of appeals held that "the Federal Maritime Commission lacks

jurisdiction under Section 15 of the Shipping Act of 1916, to approve arrangements of the type involved here" (Pet. App. 49). It concluded that "both the language and context of Section 15 itself and the legislative history accompanying it demonstrate that this particular agreement is not covered" (*id.* at 20–21). The court also rejected the Commission's argument that congressional enactments subsequent to the Shipping Act reflect a legislative recognition or grant of Commission jurisdiction in this area (*id.* at 33–38).[1]

SUMMARY OF ARGUMENT

In the Shipping Act, 1916, Congress gave the Federal Maritime Commission jurisdiction to supervise and control "agreements" between common carriers by water. It provided in Section 15 that the Commission's approval of arrangements within any of seven enumerated categories would exempt the transaction from the operation of the antitrust laws. The language of the statute shows that the types of agreements covered are those which contemplate "exclusive, preferential, or cooperative working arrangements" (46 U.S.C. 814). As the Commission acknowledges (FMC Br. 14), " 'acquisition, merger or consolidation' agreements are not specifically enumerated * * *."

[1] Having concluded that Section 15 does not confer jurisdiction upon the Commission to approve the agreement involved here, the court of appeals found it unnecessary to consider the other issues presented. It simply noted that the Commission's peremptory denial of Seatrain's protest and its approval of the agreement on the basis of the pleadings alone precluded an adequate exploration of the problems presented by the proposed acquisition either by the agency in the first instance or by the court on review (Pet. App. 48–49).

The legislative history of the Act demonstrates that Congress did not intend to bring transactions of the latter sort within the Commission's jurisdiction. The statute was based on a comprehensive study of the shipping industry by the House Committee on Merchant Marine and Fisheries, culminating in the Alexander Report which contained specific recommendations the Shipping Act was designed to implement. The Report shows that Congress' use of the term "agreement" in Section 15 was meant to encompass "understandings, conferences and other arrangements" (46 U.S.C. 814) among steamship lines characterized by their continuing nature, that is, agreements contemplating the continued existence of the parties and their active participation in the on-going arrangement for a period of time.

Mergers and acquisitions of control or ownership do not fit this description. They do not anticipate a continuing working relationship; the transaction is essentially a single event which is complete upon consummation. The Alexander Committee recognized this difference; in referring to such arrangements it consistently described them as "mergers", "acquisitions of control," and the like; never did it use the word "agreements" in this context. Moreover, the Committee, pointing out that Congress had only a few years earlier enacted legislation directed to mergers and acquisitions, proposed no new legislation in this area. Rather, it recommended that only "agreements" of a continuing and on-going nature, *i.e.*, cooperative working arrangements, be brought under government su-

pervision and control. The Shipping Act, 1916, accomplished that objective.

The suggestion that Congress by implication intended to confer on the Commission broader authority than indicated by the language of the statute or its legislative history is dispelled by looking to contemporaneous and subsequent legislation conferring on other agencies jurisdiction over corporate amalgamations. Whenever Congress has authorized agency approval over acquisitions of control or ownership, and provided for antitrust immunity for the approved transactions, it has done so in explicit language. Never has it extended jurisdiction in this area simply by the rubric "agreement."

Neither the decisions of the Commission nor the better-reasoned decisions of the federal courts support a reading of the Shipping Act as authorizing the Commission to approve an acquisition by one carrier of the assets of another, thereby removing the transaction from the operation of the antitrust laws.

ARGUMENT

THE FEDERAL MARITIME COMMISSION'S AUTHORITY TO APPROVE, AND THEREBY TO IMMUNIZE FROM THE ANTITRUST LAWS, CERTAIN AGREEMENTS AMONG WATER CARRIERS DOES NOT COVER THE ACQUISITION BY ONE CARRIER OF THE ASSETS OF ANOTHER

The arrangement between PFEL and Oceanic, however characterized by the parties ("Contract of Sale"), the Federal Maritime Commission ("Agreement") or the United States ("Merger"), undeniably contemplates "the sale of all the assets of one common

carrier by water to another" (Pet. App. 22). While the acquired carrier, Oceanic, is permitted to retain its corporate existence to enable it to reenter the trade in the future, the acquisition for all practical purposes eliminates it as a viable competitor of PFEL. The arrangement involves a single transaction which is complete upon consummation and does not require or contemplate any further joint action by the parties for its implementation. This transaction thus is different from the agreements for cooperative working relationships among shipping lines, which this Court examined in *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261, and *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238, 241–243.

The question here, as the court below stated (Pet. App. 19; footnotes omitted), is whether acquisitions of this sort "falls within the scope of the Commission's jurisdiction as defined by the Shipping Act of 1916." We agree with the court of appeals that (1) the language of Section 15, (2) its legislative history, (3) contemporaneous and subsequent congressional enactments, and (4) the Commission's own interpretation of the statute and the better-reasoned court decisions, all indicate that they do not.[4]

[4] The question whether the present acquisition by PFEL violates the antitrust laws was not considered by the court of appeals (Pet. App. 27) and is not before this Court. The United States has taken no position on that issue in this or any other litigation.

B. THE STATUTORY LANGUAGE

As originally enacted in 1916, Section 15 of the Shipping Act, 39 Stat. 733, provided for submission to the Commission's predecessor[5] of "every agreement"—including "understandings, conferences and other arrangements"—among common carriers by water:

> [1] fixing or regulating transportation rates or fares;
>
> [2] giving or receiving special rates, accommodations, or other special privileges or advantages;
>
> [3] controlling, regulating, preventing, or destroying competition;
>
> [4] pooling or apportioning earnings, losses, or traffic;
>
> [5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports;
>
> [6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;
>
> [7] or in any manner providing for an exclusive, preferential, or cooperative working arrangement.[6]

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[5] The predecessors to the present Federal Maritime Commission (75 Stat. 840 (1961)) were the United States Shipping Board (39 Stat. 728, 729, 733 (1916)), the United States Shipping Board Bureau of the Department of Commerce (Exec. Order No. 6166, § 12 (1933)), the United States Maritime Commission (49 Stat. 1985 (1936)), and the Federal Maritime Board (64 Stat. 1273 (1950)). We will refer herein simply to the "Commission."

[6] The 1961 amendments to the Shipping Act did not alter this language. To the extent that the amendments have any bearing on the manner in which Section 15 should be construed, they are discussed *infra*, at pp. 28–31.

As the court below observed (Pet. App. 21), what is distinctive about the first six of the above categories is that they "of necessity imply the continued existence of the parties and their participation in such agreements over time * * *." The language speaks in terms of "on-going" arrangements, primarily those "regulating" various aspects of the shipping trade. See *United States* v. *R. J. Reynolds Tobacco Company*, 325 F. Supp. 656, 659 (D.N.J.), certiorari denied No. 71-157, March 5, 1973. The seventh category differs from the others only in that it is framed in more general terms. When read in context, its clear import is to include within the Act's coverage those "working arrangements" not specifically within the foregoing enumerated categories. It is in this respect no different from the fourth, and final, category of prohibited practices listed in Section 14 of the same statute—*i.e.*, "resort to other discriminating or unfair methods * * *"—which this Court held in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 492, "must be construed as constituting a *catchall clause* by which Congress meant to [cover] other devices not specifically enumerated but similar *in purpose and effect* * * *" (emphasis added).

Thus from the face of the statute, it appears that the Commission's jurisdiction under Section 15 was intended to extend generally to pooling, rate and other cooperative working agreements, which by their very nature require the continued and active participation of the parties thereto. That this is what Congress had in mind is confirmed by the authority it conferred on the Commission under Section 15. The

second paragraph of that Section empowers the Commission to disapprove covered agreements "whether or not previously approved" upon finding them to be "unjustly discriminatory or unfair." The third paragraph declares agreements existing at the time of enactment to be lawful "until disapproved by" the Commission. The fourth paragraph states that agreements subsequently entered into shall be lawful "only when and as long as approved." These provisions further indicate that the jurisdiction Congress gave the Commission was over only those agreements which are, as the court of appeals stated (Pet. App. 22), "amenable to continuing Commission supervision," that is, "on-going" arrangements susceptible to cancellation or modification "[i]f changing conditions warrant it" (*ibid.*). See *Current Legislation-Government Regulation of Private Shipping*, 17 Colum. L. Rev. 357, 358 (1917).[1]

This is not the character of the present "agreement," which, as stated at the outset, provides for the transfer of all of Oceanic's assets to PFEL in a single transaction, thereby "transform[ing] the relationship of the merging parties at the instant of merger" (*United States* v. *R. J. Reynolds Tobacco Company, supra*, 325 F. Supp. at 659). A "subsequent Commission cancellation or modification" of such an arrangement would, in the words of the court below, "be

[1] That the several paragraphs of Section 15 are to be read in relation to each other and in the context of the Section as a whole is not questioned. Compare *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 602.

very difficult if not impossible to implement" (Pet. App. 22). "'[A]cquisition, merger or consolidation' agreements" of this sort, the Commission acknowledges (FMC Br. 14), are not "specifically enumerated in the language of Section 15." But, it contends (FMC Br. 7, 13), they should be brought within the Act's coverage as agreements "controlling, regulating, preventing or destroying competition."

This category of agreements, however, was no more intended to be read in isolation than were the rest, and thus it, too, is subject to the qualification which the court of appeals correctly held to be implicit in "[t]he whole structure of Section 15," that the agreements covered must be "of a continuing nature" (Pet. App. 22). To the extent that the language used in the third of the enumerated statutory categories of covered "agreements" admits to any ambiguity in this regard—which we dispute—the Commission's argument for a broader construction in this area is refuted by the legislative history of the Shipping Act, 1916.

B. THE LEGISLATIVE HISTORY OF SECTION 15

The Shipping Act was passed as the result of an exhaustive investigation of the shipping industry by the House Committee on the Merchant Marine and Fisheries under the Chairmanship of Congressman Alexander. See *Federal Maritime Board* v. *Isbrandtsen Co., supra*, 356 U.S. at 487–490; *Volkswagenwerk* v. *Federal Maritime Commission, supra*, 390 U.S. at

275. Following extensive hearings, the Committee issued a lengthy report, generally referred to as the "Alexander Report,"[8] which concluded with a number of recommendations (see PFEL's Br., pp. 1a–10a) that served as the basis for the 1916 legislation.[9]

The Alexander Report discussed the different types of arrangements then being used by American shippers in both the foreign and the domestic trade. Based on responses to questionnaires and circulars distributed to the shipping industry,[10] and on two volumes of hearings and a volume of diplomatic and consular reports, the Committee found that "it is the almost universal practice for steamship lines engaging in the American *foreign* trade to operate * * * under the terms of written agreements, conference arrangements or gentlemen's understandings" that provide for "fixing or regulation of rates," "allotting the ports of sailing," "pooling of earnings," or "meeting the competition of nonconference lines" (Alexander Report, p. 415; em-

[8] See Report of the House Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. Doc. No. 805, 63d Cong., 2d Sess. (1914).

[9] See the Senate Report on H.R. 15455, the bill finally enacted into law, which reprints the recommendations and indicates the heavy reliance that Congress placed on them. S. Rep. No. 689, 64th Cong., 1st Sess. (1916). See *Federal Maritime Board* v. *Isbrandtsen Co., supra*, 356 U.S. at 490, n. 11; *Volkswagenwerk* v. *Federal Maritime Commission, supra*, 390 U.S. at 276, n. 25.

[10] Portions of these questionnaires and circulars are reproduced in the supplement to the *amicus* brief entitled "Legislative History of Section 15 of the Shipping Act of 1916," at pp. 42–47.

phasis added). Indeed, all of the 80 steamship agreements and conference arrangements relating to foreign trade that were analyzed in the Alexander Report concerned on-going working arrangements of the sort enumerated above (Alexander Report, pp. 21–295). "None * * * [bore] the slightest resemblance to an agreement of merger * * *" (*United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659.

With respect to the *domestic* shipping trade, the House Committee observed a somewhat different situation. In addition to the cooperative agreements so prevalent in the international area, there were on the domestic front a number of mergers, consolidations and acquisitions, primarily by railroads seeking to gain control of common carriers by water (Alexander Report, pp. 404–405). The Alexander Report stated (*id.* at 409; emphasis added):

> The numerous methods of controlling competition between water carriers in the domestic trade, referred to in the preceding pages, may be grouped under three headings, *viz.*, (1) control through the *acquisition* of water lines or the *ownership* of accessories to the lines; (2) control through *agreements or understandings;* and (3) control through special practices. * * *

This distinction between "acquisitions" or "ownership," on the one hand, and what the House Committee referred to as "agreements or understandings," on the other, is observed "[c]onsistently throughout the Report" (*United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659); "mergers and

other corporate reorganizations * * * are referred to by the terms 'consolidation by ownership' and 'control through acquisition', or variations thereof," but "[n]ever" by "the word 'agreement' " (*ibid.*). When the word "agreement" is used, or a variant thereof (*i.e.*, conference or understanding), it is only in connection with working arrangements of an on-going nature calling for the cooperative participation of the parties for an extended period of time. *Ibid.*[11]

The same distinction is made in the recommendations by the Committee, which Congress effectively implemented in the Shipping Act, 1916. The principal focus of these recommendations was on "the agreements and understandings * * * so universally used * * *" in the foreign trade (Alexander Report, p. 415). Faced with the alternative of outlawing such cooperative working arrangements altogether or placing some restrictions on their continued use, the Committee selected the latter course. It pointed out (*id.* at 416):

> Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would

[11] The use of the word "agreement" in this context, as distinguished from use of the words "own" or "control" when talking of acquisitions, consolidations and mergers, is also seen in the House Resolutions authorizing the Alexander Committee investigations (H. Res. 425 and 587, 62d Cong., 2d Sess.), and in the questionnaires distributed by the Committee (Alexander Report, pp. 10–16).

> either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. * * * [E]ither would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. * * *[11]

In order to forestall such drastic consequences, the Committee recommended that "the several [steamship] lines in any given trade [be permitted] to cooperate through some form of rate and pooling arrangement under Government supervision and control" (*ibid.*). It proposed that this be accomplished by requiring "all carriers engaged in the foreign trade of the United States" to file for approval with the appropriate government authorities "any agreements, understandings, or conference arrangements * * * entered into (1) with any other steamship companies * * * or (2) with American shippers, railroads or other transportation agencies" (*id. at* 419-420).

[11] The Committee also concluded (Alexander Report at 416) that a flat ban on all such working arrangements among steamship lines

> * * * would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. * * *

As the court of appeals correctly observed (Pet. App. 32), "[t]he clear tenor of the Committee's analysis, the problems it faced and the solution it proposed, all related to agreements of a continuing nature." The recommendation that such "agreements" be preserved "under some form of effective government supervision" (Alexander Report, p. 417) did not contemplate similar approval for acquisitions, consolidations or mergers. To the contrary, the latter type of arrangement was an "anathema to the Committee" (*United States* v. *R. J. Reynolds Tobacco Company*, *supra*, 325 F. Supp. at 660).

Indeed, it was the determination to avoid forcing just such permanent and irretrievable combinations between and among carriers that prompted the Committee to recommend *against* a complete prohibition of cooperative working agreements. For the on-going conference or understanding, unlike a merger or other acquisition, although perhaps causing the elimination of competition with respect to rates, still leaves, as pointed out below (Pet. App. 33), "ample room for competition in a variety of areas other than rates, especially those which relate to the quality of service provided by the various steamship lines."[11] Thus, within the area of government supervision contemplated by the Alexander Committee, the competitive

[11] The court of appeals here quoted the following exerpt, reflecting "the range of non-price competition" (Pet. App. 33, n. 28), from Gorter, *United States Shipping Policy*, 145 (1956):

> If we assume, theoretically, that the members of a conference adhere strictly to their agreement, then they must compete

"structure" of the industry is left intact and the parties to the continuing "agreements" survive to continue their competitive "conduct." [34] See Marx, *International Shipping Cartels*, 250–251 (1953). The legislative history reflects no intent to commit to similar administrative supervision arrangements of a wholly different character, such as involved here, which have the immediate effect of changing the competitive structure of the industry by eliminating competitors, rather than merely limiting competition."

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with each other on a so-called nonprice basis. Better service would appear to be the principal inducement to offer to shippers in an effort to obtain their patronage. This means offering faster, more convenient schedules, and special facilities for cargo handling—*e.g.*, refrigerated space. However, even speed may be ruled out as a competitive factor. In some conferences, rates have been geared to speed—the slower the vessel the lower the rates. Actually competition often goes beyond these theoretical confines. Violations of agreements occur and competition intrudes on rates. The abuses will persist so long as they are not flagrant or discovered by disadvantaged "clean" competitors. Such "shadings" of the rules are difficult to eliminate in an arrangement based on self-interest but calling for self-discipline. Competition among conference members is often intense, depending upon conditions in the trade.

[34] "Structure" refers to conditions in any industry which are relatively permanent or which change only slowly and which affect the way a firm in that industry operates—*e.g.*, the number and size distribution of firms in the market. "Conduct" or "behavior," on the other hand, refers to the firm's actions and are usually alterable in relatively short periods of time—*e.g.*, rate-making, pooling arrangements, etc. See Kaysen and Turner, *Antitrust Policy*, 59–60 (1959); Areeda, *Antitrust Analysis*, 70–71 (1967).

[35] Such merger arrangements, moreover, are not characterized by secrecy, which was a principal objection with respect

This is further borne out by the Committee's recommendations with respect to the domestic shipping trade (see PFEL's Br. pp. 1a–10a). It is in this area that the Alexander investigations uncovered substantial evidence of acquisitions and mergers, primarily in connection with efforts by the railroad lines to acquire control or ownership of the domestic water lines. The Alexander Report (pp. 404–405) revealed that, through the acquisition of carriers by water, the railroads then accounted for about 50 percent of all tonnage moving by water in the coastwise and Great Lakes trade.

The Committee, however, did not recommend new legislation to deal with this situation. It pointed out that the recently enacted Panama Canal Act of 1912, "extending the jurisdiction of the Interstate Commerce Commission over interstate transportation which involves the carriage of property by rail and water," went "far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States" (Alexander Report, p. 422). Section 11 of that Act (37 Stat. 566, 49 U.S.C. 5(14)–(16)) specifically forbade, after July 1, 1914, any railroad or other common carrier subject to the jurisdiction of the ICC "to own * * *

to the working agreements and conferences analyzed by the Committee (Alexander Report, pp. 293–295, 307). Thus one of the major reasons given by the Committee (*id.* at 311–313) for requiring working agreements to be filed for approval with government authorities—*i.e.*, to eliminate "the secrecy with which agreements and conferences are now conducted" (*id.* at 417)—has no application in the context of mergers, consolidations and acquisitions, which ordinarily are widely publicized.

control, or have any interest whatsoever (by stock ownership or otherwise, either directly or indirectly * * *) in any common carrier by water operated through the Panama Canal or elsewhere" with which the railroad or other carrier may compete."

Accordingly, the Committee's recommendations with respect to domestic shippers had much the same focus as in the international area. It proposed, among other things, that port-to-port rate and traffic arrangements of domestic water carriers be brought within the supervision and control of the government, that "all agreements or arrangements affecting interstate transportation" be filed for approval, and that "all [interstate] traffic associations or conferences" be supervised by appropriate government authorities (Alexander Report, pp. 422-423). Thus in the domestic trade context, as well, "[t]he clear tenor of the Committee's * * * [proposed] solution * * * related to agreements of a continuing nature" (Pet. App. 32). In fact, in the single recommendation (No. 12) addressed to arrangements of the sort at issue here, the Committee, as it had done "throughout the Report" (*United States* v. *R. J. Reynolds Tobacco Company*, *supra*, 325 F. Supp. at 659), made no mention of "agreements," but urged "that the railroads be prohibited in the future from *acquiring, either directly or indirectly, ownership and control of or interest in canals* * * * when

[10] The prohibition against common control of railroad water transportation was qualified to the extent of authorizing the Commission to permit a railroad to continue to operate a water line other than through the Canal, if, among other things, such operation will not reduce competition on the route by water. 37 Stat. 567.

the same are used in interstate transportation" (Alexander Report, p. 424; emphasis added)."

This legislative background shows that Congress, in enacting the Shipping Act, 1916, "to carry out [the Alexander] recommendations" (*Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. at 490, n. 11), intended to subject to federal supervision under Section 15 only cooperative working arrangements of the sort the House Committee had indicated should be brought under general government control. The statute used the word "agreement" with the same meaning as in the Report, namely, to "describe practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time" (*United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659). To the extent that such a *continuing* "agreement" is one "controlling, regulating, preventing, or destroying competition" (46 U.S.C. 814), it falls within the third category listed in Section 15. But mergers, acquisitions, and consolidations, although perhaps in some instances having a destructive effect on competition, are not for that reason also within the Act's coverage; such arrangements represent "a single, discrete event, which transforms the relationship of the merging parties at the instant of merger" (*United States* v. *R. J. Reynolds Tobacco Company,*

" While, as already pointed out, the Panama Canal Act of 1912 prohibited railroad control of common carriers by water, it did not reach ownership of canals used for interstate transportation. The Committee's recommendation that this practice be reached by additional legislation was not followed by Congress.

supra, 325 F. Supp. at 659). As such, they are outside the scope of "government supervision of anticompetitive working arrangements" (Pet. App. 32) as contemplated both in the language and the legislative history of the Shipping Act of 1916.

c. CONTEMPORANEOUS AND SUBSEQUENT LEGISLATION

1. A comparison of the language of Section 15 of the Shipping Act with that used in contemporaneous and later congressional enactments which confer jurisdiction over corporate amalgamations further indicates that acquisitions and mergers are not transactions that were intended to be encompassed within the term "agreements" in the instant statute. When Congress determined to reach by legislation arrangements of the sort involved here—the acquisition of all assets—it consistently has so stated in clear and specific language.

Thus, as we earlier indicated (*supra*, pp. 21–22), in amending Section 5 of the Interstate Commerce Act to outlaw, *inter alia*, railroad acquisitions of water carriers, Congress, in the Panama Canal Act of 1912, identified the prohibited activity as "to own * * * control, or have any interest whatsoever (by stock ownership or otherwise, either directly or indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any [competing] common carrier by water * * *" (37 Stat. 566–567). Similarly, the same Congress which conducted the exhaustive Alexander investigations of the shipping industry (*Carnation Co.* v. *Pacific Con-*

ference, 383 U.S. 213, 218), when it enacted the prohibition against mergers in Section 7 of the Clayton Act in 1914, employed the terms "acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation" (38 Stat. 731).

As the court of appeals observed (Pet. App. 26), "[i]t is highly unlikely, in view of this specific [contemporaneous] statutory treatment by Congress of the antitrust implications of acquisitions of corporate control, that Congress originally intended to exempt such acquisitions under Section 15 of the Shipping Act by making no specific reference to them but simply by including them under the rubric 'agreement.'" That term does not even reach consolidations of corporate control by direct purchase from stockholders, which was the most prevalent type of acquisition at the time the Shipping Act was passed. See, *e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 338. See Note, *The Shipping Industry Seeks A Safe Haven: Merger Jurisdiction for the FMC,* 5 Law & Pol. Int'l Bus. 274, 280–281 (1973).

Moreover, such a legislative approach would have been inconsistent with the congressional method of dealing with anticompetitive practices in other areas of commercial activity. In Section 407 of the Transportation Act of 1920, 41 Stat. 481–482, for example, which further amended Section 5 of the Interstate Commerce Act, Congress dealt separately with cooperative working arrangements and with consolidations of ownership. It used the term "agreement"

only in describing the former (Sec. 5(1)).[12] With respect to interlocking ownership, the amendment specifically authorized the Interstate Commerce Commission to approve, *inter alia*, "the acquisition [by one carrier] * * * of the control [of another] * * * under a lease or by the purchase of stock in any other manner not involving the consolidation of such carriers into a single system for ownership and operation" (Sec. 5(2)).[13]

Similarly, in Section 412 of the Civil Aeronautics Act of 1938, (now the Federal Aviation Act, 49 U.S.C. 1382), Congress differentiated between working "agreements" (52 Stat. 1004), on the one hand, and airline mergers or acquisitions (52 Stat. 1001), on the other. Both types of arrangements were made subject to the jurisdiction of the Civil Aeronautics Board, and, if approved by that agency were accorded exemption from the antitrust laws (49 U.S.C. 1384).

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[12] The then new Section 5(1) made it unlawful, unless approved by the Interstate Commerce Commission, "for any common carrier * * * to enter into any contract, agreement, or combination with any other common carrier * * * for the pooling of freights * * * or to divide between them the aggregate or net proceeds of earnings * * *" (41 Stat. 480–481).

[13] Section 5(2) also authorized the Commission to permit "two or more carriers by railroad * * * to consolidate their properties * * * into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management and operation * * *" (41 Stat. 481–482).

In 1933, Congress further amended Section 5 to consolidate the provisions of former Sections 5(2) and 5(6) under a new Section 5(4) with common standards for approval of noncarrier control of two or more carriers by stock ownership (48 Stat. 217). In 1940, Sections 5(1), 5(2) and 5(11) were enacted in their present form (54 Stat. 905).

But, in describing the types of cooperative working "agreements" that were covered, Congress employed virtually the same language in the Civil Aeronautics Act (49 U.S.C. 1382) that it had earlier used in Section 15 of the Shipping Act (*McManus* v. *Civil Aeronautics Board*, 286 F.2d 414 (C.A. 2); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290, n. 13), while it used the terms "merger," "ownership," and "acquisition of control" when referring to airline "acquisitions" (49 U.S.C. 1378). Cf. *Pan American World Airways* v. *United States*, 371 U.S. 296, 301–304.[*]

In sum, at no time to our knowledge has Congress used the word "agreement" when it intended to give a regulatory agency jurisdiction over transactions other than cooperative working arrangements of a continuing nature. Where it has made the determination to authorize an agency to approve acquisitions of control or ownership and to confer antitrust immunity upon the approved acquisitions, it has so stated in explicit language. Here, however, as even the Commission acknowledges (FMC Br. 14), "'acquisition, merger, or consolidation' agreements are not specifically enumerated in the language of Section 15 * * *." The court of appeals correctly pointed out (Pet. App. 32) that "[t]hey were neither part of the problem [with which Congress was concerned] nor part of the solution." Instead, the legislative

[*] The Federal Communications Act (47 U.S.C. 221, 222) similarly gives the Federal Communications Commission jurisdiction over "consolidation, acquisition, or control" of telephone companies and over "consolidation or merger" of telegraph companies, and immunizes from the antitrust laws such of those transactions that the Commission approves.

focus was essentially on agreements which the statute itself describes as "exclusive, preferential, or cooperative working arrangements" (46 U.S.C. 814). It was in this area alone that Congress gave the Commission its approval authority under Section 15. As the court below stated (Pet. App. 32), "Congress intended to tolerate only the minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines * * *."[11]

2. The Commission's excerpts from legislative reports published in connection with the 1961 Amendments to the Shipping Act, 1916 (FMC Br. 38–41) do not undermine that conclusion. To the contrary, even assuming that later congressional pronouncements are relevant to the question of what the legislators intended in 1916 (compare *United States* v. *Wise*, 370 U.S. 405, 414), the clear understanding of

[11] The Commission's contention that a contrary reading of the Shipping Act can be gleaned from the 1950 Amendment to the Clayton Act (15 U.S.C. 18)—which exempted from Section 7 coverage "transactions duly consummated pursuant to authority given by * * * [statute to the] Maritime Commission * * *," among others—is, as the court of appeals stated (Pet. App. 35), "a bootstrap attempt to derive a positive statutory grant of authority from what is merely a list of agencies whose then-existing authority Congress did not intend to affect, either affirmatively or negatively." The added reference in Section 7 to the Maritime Commission and other regulatory agencies was not intended as a grant of authority or power which the respective agency did not already possess. See S. Rep. No. 1775, 81st Cong., 2d Sess., p. 7; *California* v. *Federal Power Commission*, 369 U.S. 482, 486; *Milk Producers Association* v. *United States*, 362 U.S. 458, 469–470.

Congress in 1961 was that Section 15 had always contemplated, and would continue to contemplate, that the Commission has jurisdiction only over on-going working arrangements of the sort we have already described.

The 1961 Amendments were in part a response to this Court's decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, which cast doubt upon the Commission's authority under Section 15 to approve exclusive-patronage-dual-rate agreements between independent shippers and a shipping conference.[*] Following that decision, both the Senate Commerce Committee, through its Subcommittee on Merchant Marine and Fisheries, and the House Merchant Marine and Fisheries Committee, through its Subcommittee on Steamship Conferences, conducted exhaustive investigations into the operation of shipping conferences in international trade. A review of this legislative history reveals that the entire focus was on the various conference agreements and devices used by water carriers as cooperative working arrangements; acquisitions and mergers were not even considered.[**]

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[*] Under such agreements, shippers who agree to deal exclusively with members of a shipping conference, rather than with independent carriers in the trade served by the conference, are charged lower rates than are charged shippers who do not so agree. *Isbrandtsen* suggested that certain conference agreements of this sort violated Section 14 of the Act and thus that the Commission was without authority to approve them (356 U.S. at 491–498).

[**] See Index to the Legislative History of the Steamship Conference / Dual Rate Law. S. Doc. No. 100, 87th Cong., 2d Sess. (1962), which contains a compilation of the pertinent legislative history accompanying the 1961 amendments.

Both Houses reported out bills to amend the 1916 Act. "The bill as reported out by the Senate [S. Rep. No. 860, 87th Cong., 1st Sess.] was more antitrust exemption oriented than that which passed the House [H. Rep. No. 498, 87th Cong., 1st Sess.]" (*Latin America/Pacific Coast Steamship Conference* v. *Federal Maritime Commission*, 465 F. 2d 542, 550 (C.A. D.C.), certiorari denied, No. 72-213, October 24, 1972), and was essentially the one which was enacted into law. To the extent relevant here, it amended Section 15 "to provide considerably broader Commission authority" (*id.* at 550-551) to disapprove conference agreements against the public interest (75 Stat. 763, 46 U.S.C. 814), and added to Section 14 a new provision permitting the Commission to approve dual rate conference agreements satisfying certain specified conditions (75 Stat. 762, 46 U.S.C. 813a).

This special treatment with respect to shipping conferences in the 1961 Amendments to the Shipping Act, is, we submit, entirely consistent with the intent of the 1916 legislators, as demonstrated above, "to grant the Commission authority to deal only with agreements of a continuing nature" (Pet. App. 22). As Senator Schoeppel stated on the floor of the Senate in support of the 1961 legislation (107 Cong. Rec. 19422):

> "* * * U.S. law for 45 years has exempted steamship conferences from the antitrust laws and substituted instead the restraint of Government regulation specifically designed to take into account the international character of the industry. This bill is based on that approach * * *."

Nor does the 1962 Report of the Antitrust Subcommittee of the House Judiciary Committee,[34] to which the Commission refers (FMC Br. 40), contradict this understanding. That Report also deals with the activities of shipping conferences in the foreign trade, and devotes much attention to "the predatory anticompetitive devices of the conferences" (*Latin America/Pacific Coast Steamship Conference* v. *Federal Maritime Commission*, *supra*, 465 F. 2d at 550). But nowhere does it suggest that Section 15 of the Shipping Act confers authority on the Commission to approve acquisition agreements of the sort involved here. To the contrary, in the section of the Report which specifically discusses the types of agreements covered by Section 15, no mention is made of mergers or acquisitions of control or ownership, and the word "agreement" is used consistently in a context connoting cooperative working arrangements of a continuing nature (Report, pp. 333–335; and see *id.* at 5–18).[35]

D. THE COMMISSION'S INTERPRETATION AND RELEVANT COURT DECISIONS

1. Not until its recent divided decision (3–2) in *Merger-American Mail Line and Pacific Far East*

[34] Report on the Ocean Freight Industry, H. Rep. No. 1419, 87th Cong., 2d Sess. (1962).

[35] The Commission's suggestion that the Report indicates a more expansive reading of Section 15 is based on a single reference in the Report to a specific merger transaction between Ivarantsen Steamship Co. and American Export Lines as "an agreement recently approved by the * * * Commission" and on a general statement made some 300 pages later that the word "agreement" in Section 15 "is defined broadly so as to encompass 'all understandings, conferences, and other arrangements'" (FMC Br. 40).

Line, 11 F.M.C. 53, reversed on other grounds, *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F. 2d 796 (C.A. 9), did the Commission take the position that its Section 15 jurisdiction applies to acquisitions of control or ownership as well as to cooperative working agreements. And see *Agreement Nos. 9837 and 9837–1 Between United States Lines, Inc. and Sea-Land Service, Inc.*, F.M.C. Nos. 69–56, 70–51, decided February 12, 1973. Prior to 1967, the Commission had exercised jurisdiction only over arrangements which, as the court of appeals observed (Pet. App. 38–39), were "of a continuing nature calling for the supervision of the Commission, not a single transaction such as a sale of ships with no restrictions governing their subsequent use."[20]

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[20] The various Commission decisions which, it is argued, indicate a broader exercise of jurisdiction are discussed in some detail by the court below, with particular attention to the continuing nature of the relationship between the parties to the arrangement and the need for continuing supervision by the Commission (Pet. App. 39–41, n. 39).

Amicus suggests that the position we urge here with respect to the pure asset acquisition involved in the present case in distinguishable from its situation, allegedly involving a merger by stock acquisition which, as modified by Commission order, requires the acquired carrier to continue to compete with a subsidiary of the acquiring carrier under supervision of the Commission. The agreement, as restructured by the Commission, it alleges, is of an ongoing nature, making the entire transaction the type of working "agreement" contemplated by Section 15. See *Agreement Nos. 9837 and 9837–1*, F.M.C. Nos. 69–56 and 70–51, decided February 12, 1973, reproduced in the Appendix to the "Motion to Grant Writ of Certiorari and Consolidate For Oral Argument" filed in *R. J. Reynolds Tobacco Company* v. *United States*, certiorari denied, No. 71–157, March 5, 1973. It is our position that such a restructuring of a merger, through ancillary covenants relating to the manner in which the parties may hold or operate

Accordingly, far from a consistent administrative interpretation of the Shipping Act in the manner now urged by the Commission, the decisions of that agency during the first 50 years of enactment do not support the contention that Section 15 was understood by the Commission to cover a single sale by one common carrier of all its assets to another. The fact that a narrow majority of the Commission now appears to be of the view that mergers and acquisitions involving domestic carriers are encompassed within the statutory term "agreements" thus provides little guidance on how the language of the Act should properly be construed."

2. Nor, we submit, should significant weight be accorded to the decision by a divided panel of the Ninth Circuit in *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F. 2d 796, which is in conflict with the decision below and with *Reynolds Tobacco Company, supra*. As the court of appeals ob-

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their affiliate companies after the merger or acquisition is concluded, provides no basis for different treatment of the essential transaction under Section 15. To the extent that the Commission has in its more recent decisions intimated otherwise, we believe it was in error. See discussion *infra* at pp. 36–39.

The Commission has consistently taken a contrary view with respect to its jurisdiction over transactions between foreign-flag carriers which serve the United States. See *Alleged Rebates of Mitsui S.S. Co. Ltd.*, 7 F.M.C. 248, 253; *Armement Deppe, S.A.* v. *United States*, 399 F. 2d 794 (C.A. 5), certiorari denied, 393 U.S. 1094. Thus, while exercising its Section 15 approval authority over working arrangements between foreign-flag vessels, it has expressly disclaimed jurisdiction with respect to mergers between foreign-flag carriers. Compare *Meyer-American Mail Line and Pacific Far East Line*, 11 F.M.C. 53, 58, with *City of Portland, Oregon* v. *Federal Maritime Commission*, 433 F. 2d 502 (C.A. D.C.).

served (Pet. App. 46), "the *Matson* court did not engage in the careful analysis of the legislative history which characterizes * * * [the] opinion in *Reynolds Tobacco* * * *."

Moreover, the majority in *Matson* rested its decision that mergers are covered by the Act primarily on this Court's decision in *Volkswagenwerk* v. *Federal Maritime Commission*, *supra*, which it construed as requiring that the language of Section 15 be given "the broadest of readings" (405 F. 2d at 800). But *Volkswagenwerk* involved an agreement by members of an employers' shipping association to allocate among themselves a common assessment to finance a union trust fund. That arrangement, the Court held (390 U.S. at 276), was one of the "myriad of restrictive agreements in the maritime industry" which Congress intended the Commission to scrutinize under Section 15. It was in response to the Commission's "extremely narrow view" (390 U.S. at 273) of what types of "cooperative working agreement[s]" (390 U.S. at 271) came under its jurisdiction that the Court emphasized the "expansive language" of Section 15 (390 U.S. at 273). *"Volkswagenwerk* * * * did not deal with a merger," however, as the dissent in *Matson* pointed out (405 F. 2d at 803); and the above-quoted language used in the separate context of that case "cannot be read to go the whole route and authorize F.M.C. to approve mergers of great shipping corporations" (*ibid.*)."

"With respect to the policy considerations relied upon by the majority in *Matson*, the district court in *Reynolds Tobacco Company*, *supra*, 325 F. Supp. at 661, correctly stated: "* * * extensive reference to considerations of the national interest in

3. Indeed, such a sweeping interpretation of the Commission's jurisdiction under Section 15 of the Shipping Act would effectively remove from the operation of the antitrust laws many transactions which, as we have shown, Congress never intended to bring within the enumerated categories in the statute. Giving such a broad reading to the substantive provisions of that Section and thereby to the antitrust immunity also provided, would be inconsistent with the firmly established principle that legislative grants of immunity from the antitrust laws are to be "construe[d] * * * strictly." *United States* v. *McKesson & Robbins*, 351 U.S. 305, 316; and see *Milk Producers Association* v. *United States*, 362 U.S. 458, 463–466. As this Court reiterated recently in *Otter Tail Power Co.* v. *United States*, No. 71-991, decided February 22, 1973, slip. op. 5, quoting *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350–351: "'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.'" See also *Silver* v. *New York Stock Exchange*, 373 U.S. 341; *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 315.

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shipping are irrelevant to the construction of the statute." It further pointed out (*ibid.*): "The other arguments advanced in *Watson* assume a Congressional intent favoring F.M.C. authority over mergers. However, it is that intent which is the key issue for determination. Congress intended to dilute antitrust policy with respect to restrictive on-going working agreements or arrangements among shipping companies, but it does not necessarily follow from that fact that Congress also intended that mergers embodying a more serious anti-competitive character were to be similarly treated."

No such "repugnancy" has been demonstrated in the present case (see n. 21, *supra*)." In such circumstances, this Court has stated, with specific reference to situations such as involved here, that it "cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co.* v. *Pacific Conference*, *supra*, 383 U.S. at 218. And see *California* v. *Federal Power Commission*, *supra*, 369 U.S. at 485. "If Congress had desired to grant any further immunity, Congress would doubtless have said so" (*United States* v. *Borden Co.*, 308 U.S. 188, 201). We agree with the court of appeals (Pet. App. 26) that its "silence * * * in Section 15 with respect to the subject of * * * control of ownership can only be taken to mean that Congress had no intention by the Shipping Act of 1916 to exempt such arrangements from the normal administration of the antitrust laws."

The actual holding of the court of appeals was that the Commission has no jurisdiction under Section 15 of the Shipping Act, 1916, over the acquisition of one

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" The Shipping Act does not provide a pervasive regulatory scheme for controlling ocean transportation in foreign commerce (compare *Otter Tail Power Co.* v. *United States*, *supra*, slip op. 7). It does not confer upon the Federal Maritime Commission power to regulate entry into the business of ocean transportation; nor does it confer *general* rate-making power in foreign commerce, as distinguished from the limited authority given in this area to correct "unjustly discriminatory" rates (46 U.S.C. 816), and to disapprove rates which are found to be "so unreasonably high or low as to be detrimental to the commerce of the United States" (46 U.S.C. 817(b)(5)).

carrier's assets by another. In distinguishing certain Commission decisions (see n. 26, *supra*), however, the court indicated that the Commission might have jurisdiction over a merger transaction that was not limited to a simple acquisition of assets, as in the present case, but also contemplated some continuing relationship between the parties, such as a covenant to compete or not to compete (Pet. App. 43, 40 n. 39). The *amicus curiae*, R. J. Reynolds Tobacco Company, which is a party to an acquisition recently approved by the Commission which purportedly provides for such a continuing relationship (see the *amicus'* Motion to Grant Writ of Certiorari and Consolidate for Oral Argument, filed in No. 71-157, *supra*, at pp. 1a-177a), argues in its brief that, whether or not the Commission has jurisdiction over the PFEL-Oceanic transaction, it does have jurisdiction over the Reynolds' arrangement.

To the extent that the court of appeals determined that the Commission has jurisdiction of acquisitions if they contain ancillary agreements of an on-going nature, we submit that the court was in error. In our view, no valid distinction can be drawn between the pure acquisition (whether it be of assets, stock, or otherwise) and an identical transaction which is coupled with some further agreement envisioning a continuing relationship between the parties. Such ancillary covenants do not alter the fundamental character of the basic transaction, or make less applicable the considerations we have already discussed that led Congress to define the Commission's jurisdiction under Section 15 to exclude acquisitions, mergers or consolidations.

The acquisition by one carrier of the ownership or control of another eliminates the former carrier as an independent competitive factor in the trade (cf. *United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 335–349); this anticompetitive effect upon the structure of the market is no different because the carriers simultaneously enter into a further agreement of a continuing nature. Perhaps the Commission may have jurisdiction under Section 15 over the latter ancillary agreement if the underlying transaction is valid under the antitrust laws, even though it has no jurisdiction over the basic acquisition itself; but there is no warrant either in the language or the legislative history of the statute for such limited jurisdiction to be expanded in the manner suggested by the *amicus*.

The distinction the court of appeals drew between simple acquisitions and those that are accompanied by agreements which envision continuing relationships is bound to create uncertainty over the scope of the Commission's jurisdiction, and to result in attempts to change the form of acquisitions so as to subject them to Commission approval and thus obtain antitrust immunity.[*] Although this Court ordinarily does

[*] In the *R. J. Reynolds* case, *supra*, Reynolds sought Commission approval of an agreement to acquire all the stock of the United States Lines. During oral argument before the Commission, Reynolds' counsel for the first time suggested that Reynolds would agree to maintain another subsidiary (Sea-Land) and United States Lines as separate and competitive subsidiaries under its common control and subject to continuing jurisdiction of the Commission; the acquisition agreement was thereafter approved by the Commission subject to conditions which incorporated that undertaking. See motion to consolidate and grant writ, No. 71-157, *supra*, pp. 171a–172a and n. A94 at 172a.

not pass on questions unnecessary to the decision of the issue before it, it has occasionally done so in order to eliminate an unsound precedent that it believed should not be allowed to stand. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 387. We suggest that this is such a case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
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MARCH 1973.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SEATRAIN LINES, INC.; PACIFIC FAR EAST LINE, INC.; THE OCEANIC STEAMSHIP CO.; AND UNITED STATES OF AMERICA, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. THE ISSUE OF WHETHER THE FEDERAL MARITIME COMMISSION ERRED IN DENYING RESPONDENT SEATRAIN LINES, INC., A HEARING IS NOT PROPERLY BEFORE THIS COURT

Respondent, Seatrain Lines, Inc., at pages 25 *et seq.* of its Brief asserts that the Commission erred in failing to hold a formal evidentiary hearing prior to approving Agreement No. 9903 and in denying standing to Seatrain. Seatrain urges this Court to resolve "the issue which sparked this litigation" and hold that if the Commission has jurisdiction over the subject agreement, the judgment of the court below

be amended in Seatrain's favor to order the case remanded to the Commission with instructions to hold a formal evidentiary hearing and grant Seatrain standing to appear at such hearing.

The Petition for a Writ of Certiorari raised a single issue, to wit, whether the Federal Maritime Commission has jurisdiction under Section 15 of the Shipping Act, 1916, over agreements providing for the acquisition of assets of one carrier by another. Respondent Seatrain filed a Memorandum in Opposition to the Petition. Neither Petitioner nor Respondent Seatrain at the time of the Petition (nor any of the other respondents) raised as an issue the propriety of the Commission's denial of a formal hearing.

This Court has frequently stated that the only means by which a respondent can raise an issue not brought before the Court in the original petition for a writ of certiorari is via a cross-petition for certiorari. Most recently, this Court declared that the only issue before it was that raised by petitioner, "[s]ince no cross-petition for certiorari was filed by the respondent. . . ." *Brennan* v. *Arnheim & Neely, Inc., et al.*, —— U.S. —— (1973) (No. 71-1598, decided February 28, 1973, slip opinion at 4).[1]

[1] For other cases standing for the proposition that if a respondent wishes to raise an issue not raised by petitioner, it must do so by cross-petition, see *NLRB* v. *International Van Lines*, —— U.S. ——, 34 L. Ed. 2d 201 (1972); *Alaska Industrial Board* v. *Chugach Electric Assn.*, 356 U.S. 320, 325 (1958); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 431-432 (1942); *Letulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937).

The hearing issue was the principal matter brought before the court below for review. However, because of that court's disposition of the jurisdiction question, it never reached the hearing issue which Respondent Seatrain now attempts to resurrect. Since the hearing question in the instant case was treated only in dictum and not passed upon by the court below, this issue has even a lesser standing than matters dealt with in the above-cited cases, which involved issues upon which the lower courts had ruled. Respondent Seatrain, therefore, presents even less justification for departing from the rationale of the foregoing authority requiring a cross-petition by respondent to place a new issue before this Court. This view is supported by *Rorick* v. *Devon Syndicate, Ltd.*, 307 U.S. 299, 303 (1939), in which this Court held that "[o]f the various questions raised below and briefed here, only those urged in the petition for certiorari and incidental to their determination will be considered on review." Likewise, in *Connecticut Ry. & Lighting Co.* v. *Palmer et al.*, 305 U.S. 493, 496 (1939), "certiorari was granted to review only the matter which this Court was advised aggrieved petitioner."

It is submitted that the only issue properly before this Court is the jurisdictional issue raised in the Petition for a Writ of Certiorari; Respondent Seatrain, having failed to appropriately raise any other issue, cannot now be heard to say that there is before this Court a subsidiary issue in addition to that raised by Petitioner.* Thus, if this Court determines that

*It is to be noted that Respondents PFEL and Oceanic take the same position on this point. See Brief of Respondents PFEL and Oceanic at 33, n. 34.

the Commission has jurisdiction over Agreement No. 9903, it is respectfully requested that the Court remand the proceeding to the court below for resolution of the hearing issue.

If, however, the Court determines that the hearing issue is properly before it, then the Commission's decision not to hold an evidentiary hearing should be affirmed for the reasons set forth below.

II. THE COMMISSION'S DECISION NOT TO HOLD A FORMAL EVIDENTIARY HEARING WAS PROPER IN ALL RESPECTS

Respondent Seatrain, in addition to asserting that the Commission erred in failing to hold a hearing, also argues that the Commission erred in denying Seatrain standing. These arguments are essentially intertwined and inseparable, and since both rely upon the same facts and allegations, they are treated below as one for the sake of simplicity.

Seatrain suggests that an evidentiary hearing must be held with respect to any agreement coming before the Commission for Section 15 approval when such agreement is protested and a hearing is requested. Such approach would permit any carrier, whether or not competing in the trade covered by the agreement or in any way immediately affected thereby, to protest and demand a hearing because, potentially, it is a competitor. Actual and potential shippers, terminal operators, overland carriers and other persons associated with the shipping industry could similarly activate a hearing by their protest, irrespective of the protest's merits. It follows from Seatrain's argument that application of the Commission's

expertise in the initial screening and evaluation of proposed agreements should defer to such protests and in every instance an evidentiary hearing be scheduled.

The Commission has developed an extensive internal system for processing and evaluating proposed agreements. Upon receipt of an agreement, a "Notice of Agreement Filed" is immediately published in the *Federal Register;* comments are invited on the proposed agreement by interested parties and whenever any protests or other comments are received, the Commission provides an opportunity for the proponents of the agreement to respond thereto. Together with its own industry knowledge and expertise, the Commission is then able to determine whether a particular protest or comment is meritorious and presents substantial issues so as to justify the need for a formal evidentiary hearing, or whether the protest and comments are merely frivolous. When in the latter situation, the Commission concludes under Section 15's standards that the agreement is justified by a serious transportation need and is not detrimental to the commerce of the United States, or otherwise contrary to the public interest, the agreement has usually been approved without an evidentiary hearing.[4]

[4] Where the facts are generally known to the Commission, it has, in lieu of an evidentiary hearing, permitted parties to a protested agreement to submit their respective positions on affidavits and briefs before a decision is made on the agreement's approvability. *Cf. Persian Gulf Outward Freight Conference* v. *F.M.C.*, 375 F. 2d 335 (D.C. Cir. 1967).

Approval of an agreement by the Commission over protest and without hearing when the protest is without merit has been upheld by the court below. *City of Los Angeles* v. *F.M.C.*, 388 F. 2d 582 (D.C. Cir. 1967). In a later decision, this same lower court has enumerated several categories of Section 15 agreements which could be approved without a hearing including agreements "of purely routine nature," those which "have an impact on commerce that the Commission finds *de minimus*," and agreements of a "restrictive nature" when the "applicant for approval . . . [satisfies] the burden of demonstrating the need for anticompetitive restraints. . . ." *Marine Space Enclosures* v. *F.M.C.*, 420 F. 2d 577, 583–584 (1969). Significantly, the court also observed in *Marine Space Enclosure*, *supra*, at 587, that, "[i]f no protest is filed, or if no substantial issues are raised, it may then be proper for the Commission to proceed and approve the agreements."

In the instant case, Agreement No. 9903 was duly noticed in the *Federal Register* of October 14, 1970 (35 Fed. Reg. 16114), comments were filed by only one party, Seatrain, to which PFEL responded. Upon an analysis of the comments and response thereto, the Commission determined that no serious issues were raised, that the facts established that at the

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[1] Agreements found to be of a "purely routine nature" were the subjects of the following cases: *Port of New York Authority, et al.* v. *F.M.C.*, 429 F. 2d 663, 667–668 (5th Cir. 1970), *cert. denied* 401 U.S. 939; *Empire State Highway Transportation Assn., Inc.* v. *Federal Maritime Board*, 291 F. 2d 336, 338–339 (D.C. Cir. 1961), *cert. denied* 368 U.S. 931; and *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927).

time the Agreement was filed, Seatrain was not involved in the trades which were affected by the Agreement. Any interest of Seatrain in the trades involved, Trade Routes 27 (North American Pacific Coast-Australasian trade) and 29 (United States Pacific Coast-Far East trade), was merely prospective and the Commission concluded that approval of the Agreement would in no way preclude entry by Seatrain at a future date.[3]

Although Seatrain alleged that the "ships to be acquired by PFEL could be used in direct competition with Seatrain in the domestic offshore trade between the Pacific Coast and Hawaii, between Hawaii and Guam, and between the Pacific Coast and Guam" (App. 36), PFEL was restricted under its Operating Differential Subsidy (O.D.S.) agreement with the Maritime Administration to utilize the acquired vessels *only* for the carriage of passengers (including their baggage and automobiles) between the Pacific Coast and Hawaii, and between ports in California on voyages on Trade Route 27. (App. 38, 56.) (Seatrain did not carry passengers.) Further, the acquired ships were not to be used by PFEL on any service to Guam and, therefore, Seatrain's statement above quoted "is inaccurate" (App. 39).

With the foregoing positions of the parties thoroughly set forth in their submissions, and with its knowledge of the O.D.S. restrictions and the trades and commerce involved, the Commission concluded

[3] The Commission's records reflected at the time of Seatrain's protest that at least six other carriers were engaged in Trade Route 27 and 38 carriers served Trade Route 29.

that Seatrain's protest was grounded on mere speculation, and raised no substantial issues. *Marine Space Enclosures, supra*, at 587. Moreover, Agreement No. 9903 was found after careful examination by the Commission, not to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the United States, or contrary to the public interest or violative of the Shipping Act, 1916" (P.A. 53, 54), and, therefore, Seatrain's request for a formal evidentiary hearing was denied and the agreement was approved.

It is submitted that since Seatrain's protest alleging possible prospective entry into trades covered by Agreement No. 9903 did not present any substantial issue necessitating a full evidentiary hearing, and the provisions of that agreement were not of such a nature as to activate the hearing requirement, the Commission properly approved the agreement without a hearing.

CONCLUSION

The hearing issue is not properly before this Court and upon a determination that the Commission has jurisdiction over Agreement No. 9903, this case should be remanded to the court below for a determination on the propriety of the Commission's action in denying Seatrain a hearing.

Alternatively, if the Court concludes that the hearing issue is appropriately before it for consideration, it is submitted that the Commission's decision not to hold a formal evidentiary hearing was proper and should be affirmed.

Respectfully submitted.

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EDWARD G. GREIS,
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MARCH 16, 1973.

I authorize the filing of the foregoing reply brief.

ERWIN N. GRISWOLD,
Solicitor General.

U.S. GOVERNMENT PRINTING OFFICE: 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FEDERAL MARITIME COMMISSION *v.* SEATRAIN LINES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1647. Argued March 21, 1973—Decided May 14, 1973

In enacting § 15 of the Shipping Act, 1916, Congress conferred on the Federal Maritime Commission (FMC) the power to exempt from the antitrust laws agreements, or those portions of agreements, between carriers that create an ongoing arrangement in which both parties undertake continuing responsibilities, which therefore necessitate continuous FMC supervision, but not one-time acquisitions of assets that result in one of the contracting parties ceasing to exist. Pp. 6-20.

148 U. S. App. D. C. 424, 460 F. 2d 932, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1647

Federal Maritime Commission, Petitioner, v. Seatrain Lines, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 14, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 15 of the Shipping Act of 1916, 39 Stat. 728, 733, as amended, 46 U. S. C. § 814, requires all persons subject to the Act to file with the Federal Maritime Commission[1] every agreement within specified categories reached with any other person subject to the Act. The section further empowers the Commission to disapprove, cancel, or modify any such agreement which it finds to be unjustly discriminatory, to the detriment of the commerce of the United States, contrary to the public interest, or violative of the terms of the Act.[2] The Commission is

[1] Originally, the Shipping Act conferred jurisdiction on the United States Shipping Board. See 39 Stat. 728, 729, 733. Over the years the jurisdiction here at issue has been shifted to the United States Shipping Board Bureau of the Department of Commerce, see Exec. Order No. 6166, § 12, the United States Maritime Commission, see 49 Stat. 1985, the Federal Maritime Board, see 64 Stat. 1273, and finally, the Federal Maritime Commission, see 75 Stat. 840. For convenience, we will follow the practice of the parties and the court below and refer throughout to the "Commission."

[2] The Act provides in pertinent part,

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum of every agreement with

directed to approve all other agreements, and the statute expressly provides that agreements so approved are exempt from the antitrust laws.[3]

The question presently before us is whether a contract which calls for the acquisition of all the assets of one

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another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations.

. . . . .

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission . . . ."

[3] The Act provides "[e]very agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions of sections 1–11 and 15 of Title 15 and amendments and Acts supplementary thereto." Since the Act makes lawful those agreements approved by the Commission, its effect is to vest the Commission with the power to shield those agreements approved by it from antitrust attack. *See Carnation Co. v. Pacific Conference*, 383 U. S. 213, 216 (1966). *But cf. Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U. S. 238, 242–246 (1968).

carrier by another carrier and which creates no on-going obligations is an "agreement" within the meaning of this section. The question is of some importance, since if such contracts are not approved by the Commission, the antitrust laws are fully applicable to them. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966). Cf. *United States* v. *Borden Co.*, 308 U. S. 188 (1939). But cf. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932); *Far East Conference* v. *United States*, 342 U. S. 570 (1952). On the other hand, if they are within the Commission's jurisdiction, the Commission may approve them even though they are violative of the antitrust laws, although the Commission must take antitrust principles into account in reaching its decision. See *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U. S. 261, 273–274 (1968); *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U. S. 238, 244–246 (1968).

In this case, the Court of Appeals for the District of Columbia Circuit concluded that § 15 did not confer jurisdiction upon the Federal Maritime Commission to approve discrete acquisition of assets agreements. In so holding, it followed a prior District Court decision in *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 650 (NJ 1971), but declined to follow a Ninth Circuit holding that the Commission had such jurisdiction. See *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F. 2d 796 (CA9 1968). We granted certiorari in order to resolve this conflict and because the case posed an important issue concerning the interface between the antitrust laws and the Commission's regulatory powers. We conclude that in enacting § 15, Congress did not intend to invest the Commission with the power to shield from antitrust liability merger or acquisition of assets agreements which impose no on-going re-

sponsibilities. Rather, Congress intended to invest the Commission with jurisdiction over only those agreements, or those portions of agreements, which created on-going rights and responsibilities and which, therefore, necessitated continuous Commission supervision. We therefore affirm the judgment below.

I

This case was initiated when respondent Seatrain Lines, Inc. (Seatrain) filed a protest with the Commission against an agreement reached between Pacific Far East Lines, Inc. (PFEL) and Oceanic Steamship Co. (Oceanic), both of whom are also respondents here, whereby Oceanic agreed to sell all its assets to PFEL. Under the terms of the agreement, Oceanic promised to transfer its entire fleet and all the related equipment together with Oceanic's interest in two container ships then being constructed and all of Oceanic's employees to PFEL. Although Oceanic did not formally merge with PFEL and retained its corporate existence, it was left as a shell corporation wholly without assets. However, Oceanic undertook no continuing obligation not to reenter the business and compete with PFEL. On October 6, 1970, Oceanic and PFEL notified the Commission of the agreement, but accompanied the notification with an express statement that, in their view, the agreement was not within the Commission's jurisdiction. The Commission published notice of the agreement, see 35 Fed. Reg. 16114, and allowed 10 days for interested parties to protest and request a hearing. Seatrain filed such a request on October 21, 1970, alleging that it was a potential competitor of PFEL and that the acquisition agreement would have anticompetitive consequences and, hence, was contrary to the public interest standard of the statute.

Instead of holding a hearing to investigate these allegations, however, the Commission issued a summary order denying the request for an investigation and approving the agreement. The Commission held that "[w]hile section 15 of the Shipping Act, 1916, requires notice and opportunity for hearing, prior to agreement approval, there is no requirement of law that the mere filing of a protest is sufficient to require that a hearing be held before the Commission may grant approval of any protested agreement." Finding that "the likelihood of any impact at all upon [Seatrain's] operations which might result from approval of the agreement is a matter of mere speculation," the Commission concluded that "Seatrain has no standing in this matter and that its protest is without substance."[4]

After Seatrain's petition to reopen was denied, it appealed the Commission's ruling to the Court of Appeals.[5] Seatrain argued that the Commission was required to hold a hearing on its objection, while the United States, as statutory respondent,[6] and Oceanic and PFEL as intervenors, argued that the Commission lacked jurisdiction over the agreement. In a comprehensive opinion, the Court of Appeals found it unnecessary to reach the hearing issue, since it found that the Commission "lacks jurisdiction under Section 15 of the Shipping Act of 1916 to approve arrangements of the type involved here, which

[4] In light of our holding that the Commission lacked jurisdiction over this agreement, we do not decide whether the Commission's decision that Seatrain was not entitled to a hearing would have been proper in a case in which the Commission properly asserted jurisdiction. Cf. *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 137 U. S. App. D. C. 9, 420 F. 2d 577 (1969).

[5] Direct appeal to the Court of Appeals of final orders of the Federal Maritime Commission is authorized by 28 U. S. C. § 2342 (3).

[6] See 28 U. S. C. § 2344.

do not require the continued existence or participation of the parties in such arrangements." *Seatrain Lines Inc. v. Federal Maritime Commission*, 148 U. S. App. D. C. 426, 431, 460 F. 2d 932, 937 (1972). The Court therefore vacated the Commission's decision and directed that the agreement be removed from its docket. The case then came here on the Commission's petition for certiorari. 409 U. S. 1058 (1972).

II

At the outset, it must be recognized that the statutory language neither clearly embraces nor clearly excludes discrete merger or acquisition of assets agreements. The situation is therefore fundamentally different from that posed in *Volkswagenwerk Aktiengellschaft* v. *Federal Maritime Commission*, relied upon heavily by petitioner, where we held in the context of an on-going agreement that the Commission's ruling that the agreement was without its § 15 jurisdiction "simply does not square with the structure of the statute." 390 U. S. 261, 275 (1968). In this case, the statute is ambiguous in its scope and must therefore be read in light of its history and the governing statutory presumptions.

By its terms, the statute requires those covered by it to "file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement . . . or modification or cancellation thereof" which falls into any one of seven categories. These are agreements

> "[1] fixing or regulating transportation rates or fares; [2] giving or receiving special rates, accommodations, or other special privileges or advantages; [3] controlling, regulating, preventing, or destroying competition; [4] pooling or apportioning earnings, losses, or traffic; [5] alloting ports or restricting or otherwise regulating the number and character

of sailings between ports; [6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; [7] or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

None of these seven categories expressly refers to a one-time merger or acquisition of assets agreement which imposes no continuing obligation and which, indeed, effectively destroys one of the parties to the agreement. The Commission vigorously argues that such agreements can be interpreted as falling within the third category—which concerns agreements "controlling, regulating, preventing, or destroying competition."[7] Without more, we might be inclined to agree that many merger agreements probably fit within this category. But a broad reading of the third category would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed, see, *e. g., United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 316 (1956), and that "[r]epeals of antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–351 (1963) (footnotes omitted). As we observed only recently, "[w]hen . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Con-

[7] The Commission's position in this regard is not without irony. In denying Seatrain's application for a hearing and approving the agreement, the Commission held that Seatrain had failed to make sufficient allegations to show that the acquisition of assets would be destructive of competition. Yet the Commission now contends that it had jurisdiction over the agreement because it was one "preventing" competition.

gress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States*, — U. S. —, — (1973). See also *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963); *Pan American World Airways, Inc. v. United States*, 371 U. S. 296 (1963); *California v. Federal Power Commission*, 369 U. S. 482 (1962); *United States v. Borden Co.*, 308 U. S. 188 (1939). This principle has led us to construe the Shipping Act as conferring only a "limited antitrust exemption" in light of the fact that "antitrust laws represent a fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U. S. 213, 218, 219 (1966).[4]

Our reluctance to construe the third category of agreements broadly so as to include discrete merger arrangements is bolstered by the structure of the Act. It should be noted that of the seven categories, six are expressly limited to on-going arrangements in which both parties undertake continuing responsibilities. Indeed, even the third category refers to agreements "controlling," "regulating" and "preventing" competition—all of which are continuing activities. Only the reference to the destruction of competition supports the Commission's argument that the provision was intended to cover one-time, discrete transactions. But even this reference must be read in light of the final, comprehensive category which refers to agreements "in any manner providing for an exclusive, preferential, or cooperative working arrangement." As the Court of Appeals noted, this last category was clearly meant as a catchall provision, "intended . . . to sum-

[4] It is true that "antitrust exemption results, not when an agreement is submitted for filing, but only when the agreement is actually approved." *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U. S. 261, 275 (1968). But the fact remains that an expansive reading of the Commission's jurisdiction would increase the number of cases subject to potential antitrust immunity.

marine the type of agreements covered." 148 U. S. App. D. C., at 427, 460 F. 2d, at 935. Cf. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 492 (1958). It is, of course, a familiar canon of statutory construction that such clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated. See 2 J. Sutherland, Statutes and Statutory Construction § 4908 *et seq.* (3d ed. 1943) and cases there cited. Since the summary provision is explicitly limited to "*working* arrangement[s]" (emphasis added), it is reasonable to conclude that Congress intended this limitation to apply to the specifically enumerated categories as well.[9]

This reading of the statute is especially compelling in light of the rest of the statutory scheme, which simply does not make sense if the statute is read to encompass one-time agreements creating no continuing obligations. For example, the statute directs the Commission to "disapprove, cancel or modify any agreements . . . *whether or not previously approved by it* that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter" (emphasis added). The statute thus envisions a continuing supervisory role for the Commission and invests it with power to disallow an agreement after a period of time even though it had initially been permitted. But it is hard to see how the Commis-

[9] The statute itself provides no definition of the term "agreement" beyond the statement that "the term 'agreement' in this section includes understandings, conferences, and other arrangements." Although certainly not dispositive, it is at least worthy of note that these synonyms given for "agreement" are all evocative of on-going activity.

sion can exercise this supervisory function when there are no continuing obligations to supervise. And we think it unlikely that Congress intended to permit the Commission to approve acquisition of assets agreements, allow them to go into effect, and then, sometime in the indefinite future, reconstitute the expired company and unscramble the assets under its continuing power to disapprove agreements previously approved.

Similarly, the provision in the Act which provides that "[t]he Commission shall disapprove any . . . agreement . . . on a finding of inadequate policing of the obligations under it" makes no sense unless the agreements create continuing obligations to police. The statutory requirement that "continued approval" shall not be permitted for agreements "between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action," suggests an on-going relationship between the contracting parties. And the requirement that the contracting parties "adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints" can only be understood in the context of a continuing relationship between the contracting parties.

In short, while the statute neither expressly includes nor expressly excludes one-time acquisition of assets arrangements, the words must be read in context, and the context makes undeniably clear the on-going, supervisory role which the Commission was intended to perform. As the Court of Appeals concluded, "[t]he whole structure of Section 15, not only the first paragraph listing the type of agreements covered, shows an intent to grant the Com-

mission authority to deal with agreements of a continuing nature." 148 U. S. App. D. C., at 427, 460 F. 2d, at 935.

III

This construction of the Shipping Act is strongly supported by the legislative history of the Act and by Congress' treatment of other industries in contemporaneous and related statutes. As this Court recognized in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 490 (1958), most of the legislative history of the Act is contained in the so-called Alexander Report which culminated a comprehensive investigation into the shipping industry by the House Committee on the Merchant Marine and Fisheries chaired by Congressman Alexander. See House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914) (hereinafter cited as "Alexander Report"). Although legislation designed to carry out the Report's recommendations initially failed to pass, see H. R. 17328, 63d Cong., 2d Sess., a substantially similar bill was enacted in the next Congress and was clearly intended to write the Alexander proposals into law. See H. R. Rep. No. 659, 64th Cong., 1st Sess., 27; S. Rep. No. 689, 64th Cong., 1st Sess., 7.

After examining some 80 steamship agreements and conference arrangements, the Alexander Committee concluded that "practically all the established lines operating to and from American ports work in harmonious cooperation, either through written or oral agreements, conference arrangements, or gentlemen's understandings." Alexander Report, at 281. The Committee found that this network of agreements, many of them secret, provided a comprehensive system for fixing rates and suppressing competition. See *id.*, at 282–295. As the

Committee described the resulting competitive structure of the industry.

"The primary object of [the] conferences and agreements is to prevent new lines from being organized in a trade and to crush existing lines which refuse to comply with conditions prescribed by the combination, or which, for other reasons, are not acceptable as members of the conference. The methods which have been adopted from time to time to eliminate competition show the futility of a weak line attempting to enter a trade in opposition to the combined power of the established lines when united by agreement. By resorting to the use of the 'fighting ship,' or to unlimited rate cutting, the conference lines soon exhaust the resources of their antagonists. By distributing the loss resulting from the rate war over the several members of the conference, each constituent line suffers proportionately a much smaller loss than the one line which is fighting the entire group. Moreover, the federated lines can conduct the competitive struggle with the comfortable assurance that, following the retirement of the competing line, they are in a position to reimburse themselves through an increase in rates. To allow conferences, therefore, generally means giving the trade to the lines now enjoying it. Only a powerful line can hope to fight its way into the trade, and with the inevitable result, if successful, that it will join the combination or be allowed to exist by virtue of some rate understanding." Alexander Report, at 304–305.

Yet despite these findings, the Committee decided against recommending the outright banning of the conference system. Instead, it chose to place that system under government supervision and to invest an administrative agency with the power to approve or disapprove various conference arrangements. The Committee's rea-

sons for this decision are crucial to the issue presently before us. The Committee found that

> "open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represented a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement." *Id.*, at 416.

Thus, the Committee chose to permit continuation of the conference system, but to curb its abuses by requiring government approval of conference agreements. It did so because it feared that if conferences were abolished, the result would be a net decrease in competition through the mergers and acquisition of assets agreements that would result from unregulated rate wars. It is readily apparent that the Commission's reading of the statute would frustrate this legislative purpose. The Committee gave the Commission power to insulate certain anti-competitive arrangements in order to prevent outright mergers. Yet the Commission would have us construe this authority in such a way as to allow it to shield the mergers themselves—the very thing which Congress in-

tended to prevent. Cf. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 218–220 (1966).

The illogical nature of the Commission's argument is especially apparent when one remembers that at the time the Act was passed, the Commission was arguably not permitted to take antitrust policies into account when ruling on proposed agreements. We have construed the "public interest" standard contained in the Act as requiring the Commission to consider the antitrust implications of an agreement before approving it. See *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U. S. 261, 274 n. 20 (1968); *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U. S. 238, 242–244 (1968). Cf. *Mediterranean Pools Investigation*, 9 F. M. C. 264, 289 (1966). But the "public interest" criterion was not added to the Act until 1961. See 75 Stat. 763. Thus, under the petitioner's interpretation, at the time the Act was passed, the Commission was arguably required to approve merger agreements despite strong antitrust objections to them if the other criteria of the Act were met. We simply cannot believe that Congress intended to require approval of the very arrangements which, as the legislative history clearly shows, it wanted to prevent.

The legislative history also demonstrates that the Alexander Committee used the term "agreements" as a word of art and that mergers and other arrangements creating no continuing rights and obligations were not included within its definition. As the District Court in *United States* v. *R. J. Reynolds Tobacco Co.* observed,

> "The catalog or 'full classification of these agreements' (i. e., the 'agreements' to which the Alexander Committee's attention was primarily directed and to which its recommendations were exclusively directed) does not include a single agreement of merger or

other form of corporate reorganization. The 'agreements' represented in the Report are all 'on-going' in nature. Most of these 'agreements' are cooperative working arrangements. These 'agreements' describe practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time. None of the 'agreements' studied by the Alexander Committee bears the slightest resemblance to an agreement of merger, which is essentially a single, discrete event, which transforms the relationship of the merging parties at the instant of merger." 325 F. Supp. 656, 658–659 (NJ 1971) (footnotes omitted).[10]

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[10] The *Reynolds* Court's observations are directed at the Committee's study of foreign trade. In this context, the Committee found that competiton was largely frustrated by extensive use of conference arrangements. When the Committee turned to domestic trade, it found that "[u]nlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few." Alexander Report, at 421. Rather, in the domestic arena, the Committee found that competition was controlled largely through mergers, chiefly between the railroads and water carriers. The Commission argues from this fact that Congress intended merger agreements to be filed, since the legislation which was ultimately enacted made no distinction between foreign and domestic trade. But throughout the Report whenever the Committee referred to mergers and acquisitions, it distinguished sharply between them and agreements, for which the filing and approval mechanism was applicable. See the discussion in text. Cf. Note, The Shipping Industry Seeks a Safe Haven: Merger Jurisdiction for the FMC?, 5 Law & Pol. in Int. Bus. 274, 285–286 (1973). Moreover, a careful reading of the Report makes clear that the Committee envisioned other devices for controlling the mergers prevalent in the domestic field. Thus, the Committee noted that the Panama Canal Act of 1912, 49 U. S. C. § 5 (14), already prohibited railroads from owning or controlling water carriers, see —, *infra*, and observed that this requirement went "far toward eliminating some of the undesirable practices which were found by the Com-

Moreover, in the few places where the Committee did discuss mergers, it distinguished sharply between such arrangements and the on-going agreements to which its recommendations were directed. For example, in summarizing its findings the Committee wrote

> "The numerous methods of controlling competition between water carriers in the domestic trade referred to in the preceding pages may be grouped under three headings, viz. (1) control through the *acquisition* of water lines or the *ownership* of accessories to the lines; (2) control through *agreements* or *understandings*; and (3) control through *special practices*." Alexander Report, at 409 (emphasis added).

As the *Reynolds* Court concluded,

> "Consistently throughout the Report, mergers and other corporate reorganizations, when occasionally mentioned, are referred to by the terms 'consolidation of ownership' and 'control through acquisition' or variations thereof. Never is the word 'agreement' used in the Report to refer to a merger agreement. It is clear that the Alexander Committee distinguished conceptually between agreements in the sense of on-going, cooperative agreements and agreements of 'consolidation' or 'acquisition' (of which merger agreements are a form)." 325 F. Supp., at 659 (footnotes omitted).

Finally, an examination of contemporaneous and related statutes makes clear that when Congress intended

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mitted to exist in the domestic commerce of the United States." Alexander Report, at 422. While the Committee made other recommendations with respect to domestic carriers, these merely paralleled its foreign recommendations and, hence, pertained to "agreements" and "arrangements" rather than "mergers" and "acquisitions" which it thought were sufficiently regulated by existing legislation. See *id.*, at 422–424.

to bring acquisitions and mergers under control, it did so in unambiguous language. For example, only a few years prior to passage of the Shipping Act, Congress expressly dealt with mergers involving water carriers. In the Panama Canal Act, 49 U. S. C. § 5 (14), Congress provided that

> "it shall be unlawful for any carrier [as defined in the Interstate Commerce Act] . . . to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic."

Similarly, when Congress meant to require agency approval for mergers and acquisitions, it did so unambiguously. Thus, the Interstate Commerce Act, 49 U. S. C. § 5 (2)(a)(i) authorizes the Interstate Commerce Commission to give its approval "for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership." In the same manner, the Federal Communications Act, 47 U. S. C. § 222 (b)(1) provides

> "It shall be lawful, upon application to and approval by the [Federal Communications] Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as part of any such consolidation or merger or there-

after, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier."

Examination of the Civil Aeronautics Act is particularly instructive in this regard. Title 49 U. S. C. § 1382 requires air carriers to file with the Civil Aeronautics Board for prior approval

"every contract or agreement . . . for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, . . . or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements." 49 U. S. C. § 1382 (b).

This provision closely parallels § 15 of the Shipping Act, and was obviously modeled after it. Yet Congress clearly thought the provision insufficient to bring discrete merger and acquisition agreements within the Civil Aeronautics Board's jurisdiction, since it enacted another, separate provision requiring Board approval when air carriers "consolidate or merge their properties." Title 49 U. S. C. § 1378 (a)(1).[11]

[11] The Commission would have us infer that the 1916 Act conferred jurisdiction upon it from an amendment added in 1950 to § 7 of the Clayton Act, 15 U. S. C. § 18, as amended by 64 Stat. 1125, 1126. As amended, the provision provides that

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission . . . the United States Maritime Commission, or the Secretary of Agriculture."

As is clear from the face of the statute, the Act confers no new jurisdiction on any of the listed agencies, but merely provides that mergers already exempt from Clayton Act coverage were to be un-

IV

In light of these specific grants of merger approval authority, we are unwilling to construe the ambiguous provisions of § 15 to serve this purpose—a purpose for which it obviously was not intended. As the Court of Appeals found, the House Committee which wrote § 15 "neither sought information nor had discussion on ship sale agreements. They were neither part of the problem, nor part of the solution." 148 U. S. App. D. C., at 432, 460 F. 2d, at 940. If, as petitioner contends, there is now a compelling need to fill the gap in the Commission's regulatory authority, the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found. We are not ready to meet that need by rewriting the statute and legislative history ourselves.

But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. See, *e. g.*, *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944). This proposition may, as a general matter, be conceded, although it must be tem-

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affected by changes in the Act. As this Court held in *California* v. *Federal Power Commission*, the amended § 7 was "plainly not a grant of power to adjudicate antitrust issues." 369 U. S. 482, 486 (1962). Hence, nothing about the Commission's jurisdiction can be inferred from the inclusion of its predecessor on the list. This view is confirmed by the legislative history of the 1950 amendment. Although acceding to the Commission's request that it be included in the list of agencies left unaffected by the Clayton Act, see Letter of Greenville Mellen, Vice Chairman United States Maritime Commission to Senator Herbert O'Conor, Chairman, Senate Subcommittee to consider H. R. 2734, Sept. 29, 1949, reprinted in Petitioner's Brief, at 52–54, the Committee made explicit that "[i]n making this addition . . . it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess." S. Rep. No. 1775, 81st Cong., 2d Sess., 7 (1950).

pered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate. In this case, however, there is a disjunction between the abstract principle and the empirical data. The court below made a detailed study of the prior Commission cases relied upon by petitioner to bolster its interpretation of the statute and concluded that none of them involved assertion of jurisdiction over a case such as this, where the agreement in question imposed no on-going obligations. We find it unnecessary to decide whether every prior case decided by the Commission can be reconciled with our opinion today. It is sufficient to note that the cases do not demonstrate the sort of long standing, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to vest the Commission with the authority it is now seeking to assert. As this Court held in a related context,

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' . . . But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U. S. 278, 291." *Volkswagenwerk Aktiengellschaft* v. *Federal Maritime Commission*, 390 U. S. 261, 272 (1968).

In this case, we find that the Commission overstepped the limits which Congress placed on its jurisdiction. The judgment of the Court of Appeals must, therefore be

Affirmed.